

BIBIANA MWANSA MWAPE

MWPBIB002

LLM (COMMERCIAL LAW)

DR. ANDREW HUTCHISON

**AN ANALYSIS OF SECTION 86(10) OF THE NATIONAL CREDIT
ACT NO. 32 OF 2005.**

WORD COUNT: 23190

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

TABLE OF CONTENTS

PROLOGUE	3
PRIMARY GOALS OF THE RESEARCH.	4
METHODS, PROCEDURE AND TECHNIQUES.	5
STRUCTURE OF THE RESEARCH.	5
CHAPTER 1	7
THE SOUTH AFRICAN CONSUMER CREDIT MARKET	7
1.1 HISTORICAL RECOUNT OF THE SOUTH AFRICAN FINANCIAL SECTOR.	7
1.2. THE SHORTFALLS OF THE OLD LEGISLATIVE REGIME.	8
1.3 THE SOUTH AFRICAN CREDIT MARKET LANDSCAPE.	10
1.3.1 <i>The use of credit in South Africa.</i>	11
1.3.2 <i>Income and expenditure of South African households.</i>	12
1.3.3 <i>Education.</i>	14
1.3.4 <i>Historically disadvantaged individuals.</i>	14
1.3.5 <i>Financial Inclusion.</i>	15
1.4 ESSENTIAL ASPECTS OF THE NEW CONSUMER REGULATION.	16
1.5 THE NATIONAL CREDIT ACT.	18
CHAPTER 2	21
DEBT REVIEW IN SOUTH AFRICA	21
2.1 METHODS OF DEBT REVIEW.	21
2.2 <i>VOLUNTARY RE-ARRANGEMENT.</i>	22
2.3 <i>FINANCIAL INQUIRY IN TERMS OF THE MAGISTRATES' COURT ACT.</i>	23
2.3.1 Section 57 and 58.	23
2.3.2 Section 65.	24
2.3.3 Section 65A (1).	25
2.3.4 Section 65J.	26
2.3.5 Section 74.	27
2.3.6 Concluding remarks on financial inquiries in terms of the MCA.	29
2.3 <i>SEQUESTRATION.</i>	30
2.4 <i>DEBT REVIEW UNDER THE NCA.</i>	33
2.5 CONCLUSION	39
Is the debt review in terms of the NCA an improvement from the MCA debt review?	40
Is the NCA debt review an answer to the shortfalls of the Insolvency Act debt Review methods?	41
The state of debt review in South Africa.	42
CHAPTER 3	45
LITERATURE REVIEW.....	45
3.1.1 <i>COLLET V FIRSTRAND BANK & NATIONAL CREDIT REGULATOR (2011) (4) SA 508 (SCA).</i>	45
3.1.2 ANALYSIS OF THE <i>COLLET</i> JUDGMENT.	49
3.1.2.1 <i>The language in section 86(10).</i>	50

3.1.2.2 Context and environment of section 86(10).	52
3.1.2.3 Sections in the NCA.	55
3.1.2.4 Far-reaching impact of the NCA.	57
3.1.2.5 Purpose of the provision and the background to its production.	57
3.1.2.6 Right of access to court.	60
3.1.2.6.1 Inflexibility argument.	68
3.1.2.7 Good faith in South African law.	69
3.2. CONCLUSION.	74
3.2.1 National Credit Amendment Act section 86(10).	75
CHAPTER 4	77
CONCLUSION AND RECOMMENDATIONS	77
4.1 CONCLUSION	77
4.2 RECOMMENDATIONS	78
4.2.1 REMOVAL OF SECTION 86(10).	78
4.2.2 AMENDING THE ACT.	79
4.2.2.1 Section 86(6)(a).	79
4.2.2.1 Section 86(11).	80
4.2.2.2 Section 86(10).	81
Increase in time frame of debt review	81
Ground for termination.	83
An order for costs.	84
BIBLIOGRAPHY	86

PROLOGUE

The financial sector in general is a difficult industry to regulate, as there is a need to balance the competing interests of the various stakeholders. Tampering with the cornerstone of the capitalist system naturally arouses diverging views and is often the subject of many debates as is evidenced by the debates surrounding the National Credit Act ('NCA')¹. Nonetheless, its regulation can be a weapon to fight against poverty and inequality as evidenced by the purposes of the NCA.

The object of this research is to analyse the law on debt review, focusing on the credit provider's right contained in s 86(10) of the NCA to terminate the debt review process. The passage below contextualises the legal problem that this thesis analyses and seeks to address.²

Ben is a 35-year-old estate agent whose salary has recently been reduced and is now without a commission. Between him and his spouse, they have 27 credit accounts. Their accounts include 14 credit cards, 6 personal loans, a home loan, a vehicle finance loan, a SARS debt; three store accounts and a municipal account (rates, water and lights). His spouse is still employed however; a salary of R 10, 000 cannot service all their accounts and pay for their living expenses.

It has been three months since they have been able to service their debts. Ben applies for debt review in order to ease his financial burden. The debt counselor accepts Ben's debt review application and a debt restructuring proposal will be drafted. The debt counselor deals directly with all Ben's credit providers however most of them are uncooperative. His debt counselor informs him that she is struggling to obtain information from them, most of them do not respond to her requests. Meanwhile, Ben has been receiving calls

¹ 32 of 2005.

² The story is adapted from Consumer Fair December 2012/January 2013 page 4.

and letters threatening legal action from his credit providers. Since the credit providers are unresponsive, his debt counselor draws up a debt restructure proposal based on the information he has supplied to her. Some credit providers reject the proposal but do not make any constructive suggestions while others simply do not respond. His debt counselor is frustrated and decides to refer the matter to the local Magistrates' Court without their input. 60 days have lapsed since Ben applied for debt review, as such in accordance with the NCA; one of his credit providers decides to terminate the debt review. As a result of this, the credit provider is able to enforce its agreements despite Ben having applied for debt review.

Ben's predicament is one that many South Africans are faced with due to the rapidly increasing cost of living, their low income and easily extended credit facilities. The legislature acknowledged this and thus created a new profession and a procedure that would assist the consumers.

Primary goals of the research.

The specific goals of the research are as follows:

- 1) Determine the environment/context of operation of debt review;
- 2) Identify whether s 86(10) of the NCA is of vital for the achievement of the purpose and object of the debt review process and the NCA;
- 3) Consider the judgment of *Collet v Firstrand Bank*³ in light of the obstacles to debt review; and precedent on limitation clauses and good faith in South Africa;
- 4) Make recommendations.

³ (2011) (4) SA 508 (SCA).

Methods, procedure and techniques.

In order to answer the research question, an in-depth analysis of the relevant statutes, background documents, relevant research and case law will assist in determining the principles and values that underlie the Act. In addition, the Constitution will be the yardstick upon which the provision is considered in accordance with the principle of constitutional supremacy which South Africa subscribes to.

The process of interpretation articulated in the *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ will be employed when placing s 86(10) in its proper context. This process requires one to look at surrounding circumstances and the object and scope of legislation in order to ascertain the intention of the legislature.

Structure of the research.

Chapter 1 discusses consumer credit law in South Africa in general. It summarises the legislative framework that governed the consumer credit market before the NCA. It also discusses the landscape of the consumer credit market by discussing some of the relevant characteristics of the South African population. The chapter also contains a discussion of the essential aspects of consumer regulation. In concluding, it discusses the NCA, and defines the concept of over indebtedness and the debt review process.

Chapter 2 discusses the previous means of debt review provided for by the Magistrates' Court Act⁵ ("MCA") and the Insolvency Act⁶. It will also examine the means of debt review contained in the NCA. By discussing the previous regime of debt review, the research will highlight the weaknesses of that old regime and assesses whether the NCA has rectified such weaknesses.

Chapter 3 contains a summary and analysis of the leading case on s 86(10), *Collet*. It considers the obstacles to debt review and the law on limitation clauses and good faith in

⁴ 2012 ZASCA 13.

⁵ Act 32 of 1944.

⁶ Act 24 of 1936.

light of the NCA and *Collet* judgment. In concluding, it considers whether the National Credit Act Amendment⁷ addresses the shortfalls highlighted.

Chapter 4 discusses the recommendations in light of this research. The chapter will discuss the possible amendments to the provision, in addition to its removal.

⁷ No. 19 of 2014.

CHAPTER 1

THE SOUTH AFRICAN CONSUMER CREDIT MARKET

1.1 Historical recount of the South African Financial sector.

Since 1994, the South African government has been dedicated to playing a leading and enabling role towards achieving economic transformation.⁸ The consumer credit industry was placed on the government's agenda as an industry that needed regulation in order to unlock economic benefits and achieving of equality whilst minimising social and economic costs.⁹ Accordingly, the government envisioned a regulated credit market as a means by which it could address the structural legacy which resulted in discrimination against a large section of the population, the historically disadvantaged.¹⁰

The South African financial sector was characterised by the existence of a formal and informal financial sector. The highly developed formal financial sector served primarily the middle and high-income earners who were predominantly white consumers and large enterprises.¹¹ The large, informal financial market serviced by micro-lenders, loan sharks and pawnbrokers served the low-income, and historically disadvantaged consumers.¹² The “prime market” that serviced the middle and high-income and predominantly white and large enterprises was serviced at moderate rates whilst the “marginal market” was serviced by an interest rate higher than the usury cap.¹³

⁸ Department of Trade and Industry ‘South Africa Consumer Credit Law Reform: Policy Framework for Consumer Credit’, August 2004, available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2005/050608consumer.pdf>, accessed on 12 February 2015, 7.

⁹ Ibid.

¹⁰ Ibid.

¹¹ KM Louw ‘Prevention and alleviation of consumer over-indebtedness’ (2008) 20 SA *Merc LJ* 200 at 203.

¹² Ibid.

¹³ The Department of Trade and Industry ‘Credit Law Review Summary of the finding of the technical committee’, August 2003, available at http://www.ncr.org.za/publications/Background_NCA_docs/Summary%20of%20Findings.pdf, accessed on 12 February 2015, 4.

Since 1994 there has been a large increase in over-indebtedness as a result of increased access to financial services by historically disadvantaged consumers.¹⁴ In addition, the transformation of the civil service, affirmative action and aspirational borrowing led to reckless granting of credit.¹⁵ As a result of over-indebtedness, a significant percentage of personal income is used to service micro-lending debt, leaving little for the borrower to pay for household expenses.¹⁶

Even after 1994, a large portion of historically disadvantaged consumers continued to be excluded from the formal financial market. As a result they were forced to access finance, particularly credit, through the informal financial market because they were still considered a high risk and generally did not own assets that could serve as security for their loans.¹⁷ As a result of the legislation, or the lack thereof, Campbell states that the industry spiralled out of control, growing rapidly year-on-year.¹⁸ The industry grew by 30 per cent per year and the industry disbursements more than doubled in three years between September 2003 and August 2006.¹⁹

1.2. The shortfalls of the old legislative regime.

Before the enactment of the NCA, the financial market was regulated by the Credit Agreements Act²⁰ and the Usury Act²¹. The former covered the contractual aspects of credit agreements in connection with the sale and lease of movable goods. While the latter covered financial aspects of money lending contracts, leasing contracts of movable goods, rendering of services and sale of movables. Consumer regulation prior to 1994 responded in large part to the problems faced by consumers in the prime market, as a

¹⁴ Louw op cit (n12) 204.

¹⁵ Louw op cit (n12) 203.

¹⁶ J Campbell *The Cost of Credit in the Micro-finance Industry in South Africa* (LLM thesis, Rhodes University, 2006) 77.

¹⁷ Louw op cit (n12) 203.

¹⁸ J Campbell "The Excessive Cost of Credit on Small Money Loans under the National Credit Act 34 of 2005" 2007 19 *SA Merc LJ* 251 at 252.

¹⁹ Ibid.

²⁰ Act 75 of 1980.

²¹ Act 73 of 1968.

result it did not accommodate the changes in income distribution, increase in black spending power and many new entrants into the consumer market.²²

The existence of the various pieces of legislation resulted in a lack of uniformity in the credit market as there were different levels of protection afforded by the Acts leaving room for misrepresentation in regard to the disclosure requirements and abuse of the provisions of the Acts.²³ The serious inconsistency in the enforcement of credit transactions led to irregularities and abuse of the consumer especially in the informal market, this was perpetuated by inconsistency in the interpretation of the Acts by the courts thereby undermining consumer protection.²⁴ The interest caps required by the Acts were dysfunctional, credit providers could change them to include credit life insurance, loan application fees, administrative fees, club fees and various bank fees.²⁵ As a result the cost of credit would increase up to even three times above the limit set by the Acts.²⁶ This discouraged reputable credit providers from providing affordable finance to low-income earners.²⁷

Under this credit regime, the lack of disclosure, marketing and credit advertisement were misleading and insufficiently regulated and as a result the consumer's ability to make informed decisions about credit agreements was impaired.²⁸ In addition, the rate of credit activity created a risk of over-indebtedness which could impact the creation of wealth or aggravate vulnerability and poverty.²⁹ The credit bureaux also reported many irregularities which indicated a need for increased regulation and credit information.³⁰

²² Department of Trade and Industry 'Draft Green Paper on the Consumer Policy Framework' 9 September 2004, available at http://www.gov.za/sites/www.gov.za/files/26774_1.pdf, accessed on 12 February 2015, page 11.

²³ Department of Trade Industry op cit (n9) 23.

²⁴ Ibid.

²⁵ Department of Trade Industry op cit (n9) 12.

²⁶ Department of Trade Industry op cit (n9) 13.

²⁷ Ibid.

²⁸ Department of Trade Industry op cit (n9) 27.

²⁹ Department of Trade Industry op cit (n9) 19.

³⁰ Department of Trade Industry op cit (n9) 17.

At the time of enactment of these pieces of legislation there were no credit cards, and access to home loans and micro-loans was limited. Evidently, the credit market had evolved beyond what the drafters of the legislation had envisaged. In addition, globalisation highlighted the fact there was a need to modernise the consumer credit laws and to harmonise them with international best practice.³¹

1.3 The South African credit market landscape.

Consumer credit regulation is based on the assumption ‘that the law will be observed or that if it is not, the offender will be brought to book whether by civil action, by prosecution or by some administrative sanction.’³² This assumption is based on the presupposition ‘that the law will be tolerably well known and understood and that those who need to invoke it will have ready access to the legal system and willingness to be able to use it.’³³ During the course of this discussion it will become clear that the debt review process in terms of NCA is lacking in this regard because s 86(10) acts as a limitation to the consumer’s right of access to court. Furthermore, the remedy provided for by the Act, in particular debt review although is well known, is not clearly understood.

The aims of the NCA illustrate that the legislature sought to have a framework that is tailored to the South African landscape. The fragmented legislation that governed the South African credit market is not unique to her alone; Goode states that universally where there was legislation, this pattern existed.³⁴ As such South Africa’s uniqueness is not the state of this outdated legislation but rather the characteristics of her people, in particular the historically disadvantaged individuals.

³¹ Department of Trade Industry op cit (n9) 13.

³² RM Goode *Consumer Credit* (1978) page 4.

³³ Ibid.

³⁴ Goode op cit (n33) 9.

1.3.1 The use of credit in South Africa.

At the time of the drafting of the Policy Framework for Consumer Credit in 2004, the credit market was worth R362 billion, providing credit to approximately 15 million people and with the 2008 economic crisis these numbers increased drastically.³⁵ ‘During the 2013/2014 financial year, the total value of the south Africa’s gross debtors book amounted to nearly 1,55 trillion with 21.71 million credit active consumers.’³⁶ 44,2 per cent, amounting to 9,60 million credit active consumers and 329,000 less than in the last quarter, of whom had impaired credit records.³⁷ This number is reflective of the negative macro-economic conditions South African consumers are facing. A narrow focus on indebtedness only will provide an incomplete picture because the significant increases in the cost of living is a factor to consider when determining why consumer’s default on their debts that they could previously service.

The credit market is dominated by secured lending in particular motor vehicle finance which constituted of 35 per cent.³⁸ Mortgages consisted of 29.2 per cent of the credit market while unsecured and credit facilities counted for 17.8 per cent and 15.4 per cent respectively.³⁹ The number of credit consumers and the value of the credit market in South Africa is indicative of the fact that it has its benefits, and is greatly depended on by the population. Although it does come at a cost in the form of an interest rate, it allows consumers to purchase products that they would otherwise not be able to afford, and thus unlocks a diverse range of opportunities that allow for an improvement in standard of living.⁴⁰ Credit allows the consumer to purchase items such as cars, houses and pay for education, especially tertiary education.

³⁵ Department of Trade Industry op cit (n9) 6.

³⁶ National Credit Regulator ‘Annual Report 2013/2014’, available at <http://www.ncr.org.za/publications/NCR%20AR%202014%20lr.pdf>, accessed on 12 February 2015, page 34.

³⁷ National Credit Regulator op cit (n37) 37.

³⁸ National Credit Regulator op cit (n37) 35.

³⁹ Ibid.

⁴⁰ Department of Trade Industry op cit (n9) 7.

1.3.2 Income and expenditure of South African households.

Although the Statistics South Africa income and expenditure of households survey results from 2010/2011 are outdated, they provide an understanding of South African households' financial position. According to these findings, black households which accounted for more than three quarters of the total numbers of households in the country earned less than half (44,6 per cent) of the total annual household income.⁴¹ White households made up of 12.4 per cent of the total households and earned 40.1 per cent of the total income.⁴² Coloured households accounted for 8.5 per cent of the households and earned 9.9 per cent of the total income whereas; Indian/Asian household accounted for 2.5 per cent of the households and earned 5.4 per cent of the total annual income.⁴³

The average household income across all households was R 119 542 per annum; however, the average was lower among black African households (R 69 632).⁴⁴ The average was higher among coloured (R 139 190), Indian/Asian (R 252 724) and white (R 387 011) households.⁴⁵ All populations made significant real gains in average annual consumption expenditure in comparison to 2005/2006 period in which, Indian/Asian-headed households had the biggest gains in both Rand value and percentage (R 57 443 and 40.7 per cent).⁴⁶ Black African-headed households had the second largest percentage gain of 35 per cent, but the smallest increase in Rand value of R 14 510.⁴⁷ White-headed households had the smallest percentage increase (16.1 per cent) that translated to R 43 711.⁴⁸ The growth illustrates that the black middle class is slowly getting richer;

⁴¹ Statistics South Africa 'Income and Expenditure of households 2010/2011 Statistical Release P0100', 6 November 2012, available at <http://www.statssa.gov.za/publications2/statsabout.asp?PPN=P0100&SCH=>, accessed on 12 February 2015, page 11.

⁴² Statistics South Africa op cit (n42) 11.

⁴³ Ibid.

⁴⁴ Statistics South Africa op cit (n42) 12.

⁴⁵ Ibid.

⁴⁶ Statistics South Africa op cit (n42) 4.

⁴⁷ Ibid.

⁴⁸ Ibid.

however, there is still a tremendous gap between the population groups.⁴⁹ White-headed households on average earn more than 5.5 times the income of the average black African-headed household as a result inequality still remains a serious challenge for South Africa.⁵⁰

‘The average household income per annum for male-households was R 151 186, while for female-headed households this average was far lower at R 70 830.’⁵¹ 72.7 per cent of all household income is derived from work; this was true for 75.7 per cent of all income for male-headed households but only 62.8 per cent for female-headed households.⁵² For female-headed households, pensions, social insurance and family allowances accounted for a 10.9 per cent of all households’ income while 9.1 per cent came from income from individuals outside of households or income not elsewhere classified.⁵³

‘Every second adult in South Africa receives a salary or wage, including those who work full-time (29 per cent), those who work part-time (15 per cent) and some of those who have piece jobs (11 per cent).’⁵⁴ Money from others (friends and family) is a source of income for a third of adults, 29 per cent receive a government grant whereas 7 per cent of adults in South Africa do not receive money at all.⁵⁵ Considering that 46 per cent of adults in South Africa receive less than R 3,000 a month and that the average household consists of four people with one or two people contributing to the household income, it is no surprise that 23 per cent of adults stated that their household financial situation is worse than the previous year.⁵⁶ Many South Africans experience financial strain because of relatively low personal income, slow economic growth and rising inflation, fuel and

⁴⁹ Statistics South Africa op cit (n42) 5.

⁵⁰ Ibid.

⁵¹ Statistics South Africa op cit (n42) 12.

⁵² Statistics South Africa op cit (n42) 13.

⁵³ Ibid.

⁵⁴ Credit and borrowing in South Africa Finscope Consumer survey South Africa 2012, available at http://www.ncr.org.za/press_release/research_reports/NCR_14.03.2013.pdf, accessed on 12 February 2015, 11.

⁵⁵ Ibid.

⁵⁶ Credit and borrowing in South Africa op cit (n54) 13.

food prices.⁵⁷ This led to an increase in borrowing behavior and decrease in savings as such the reasons for borrowing are closely related to the economic challenges people experience.⁵⁸

1.3.3 Education.

41 per cent of the South African population comprises of adults⁵⁹ younger than 30 years, 37 per cent of them have matric and a further 39 per cent have some high school education.⁶⁰ Although there has been an improvement in educational levels⁶¹, the legacy of systematic dispossession and under investment in education for black South Africans has had a fundamental impact on credit market, which exacerbates existing imbalances.⁶² After 1994, many of the new entrants to the marketplace were still vulnerable, with limited-skills, high levels of illiteracy and poverty exacerbating the conventional information asymmetries and imbalances in bargaining power.⁶³

1.3.4 Historically disadvantaged individuals.

In order to understand the South African credit market, one must understand the lives of the historical disadvantaged individuals⁶⁴. Considering the Living Standard Measure⁶⁵ which combines a range of assets or lack thereof and area classification, results in 39 per cent of adults in South Africa being classified as HDI, living in non-metropolitan areas and coming from households classified as LSM 1-5.⁶⁶ Although a majority of adults (52 per cent) are within the LSM 5-6, 21 per cent (7.2 million) adults are within LSM 1-4

⁵⁷Credit and borrowing in South Africa op cit (n54) 12

⁵⁸ Credit and borrowing in South Africa op cit (n54) 13.

⁵⁹ An adult being 16 years or older.

⁶⁰ Credit and borrowing in South Africa op cit (n54) 11.

⁶¹ There are more people with matric.

⁶² Department of Trade and Industry op cit (n22) 9.

⁶³ Department of Trade and Industry op cit (n22) 11.

⁶⁴ Hereafter referred to as HDI. Credit and borrowing in South Africa op cit (n54) 3 defines an HDI as adults 16 years and older, LSM 1-5, residing in non-metro areas.

⁶⁵ Hereafter referred to as LSM

⁶⁶Credit and borrowing in South Africa op cit (n54) 14.

which entails that they face considerable vulnerabilities such as limited access to infrastructure for example water, sanitation and electricity in addition to absence of access to the credit market.⁶⁷

The HDI age distribution is as follows: 5 per cent is between the ages of 16-17 years, 42 per cent is between the ages of 18 and 29 years, 28 per cent is between the ages of 30 and 44 years, 14 per cent is between the ages of 45 and 59 year; and 11 per cent is over the age of 60 years.⁶⁸ 53 per cent of the HDI population is female with the reminder constituting the male population.⁶⁹

1.3.5 Financial Inclusion.

Financial inclusion which describes the extent to which the adult population engages with financial products and services such as; saving, transaction banking, credit insurance, whether formal or informal has increased from 73 per cent in 2011 to 81 per cent in 2012.⁷⁰ Looking at the gender divide, women are more likely to be financially included than men (84 per cent and 77 per cent respectively), which is largely as a result of the South African Social Security Agency paying out grants into their bank accounts.⁷¹

The levels of financial inclusion are lower among HDI, 56 per cent are formally served including those who use one or more traditional financial products supplied by banks (49 per cent) and/or have other formal non-bank products and services (52 per cent).⁷² 42 per cent of the HDI have or use informal mechanisms to manage their finances while 32 per

⁶⁷ Credit and borrowing in South Africa op cit (n54) 18.

⁶⁸ Credit and borrowing in South Africa op cit (n54) 14.

⁶⁹ Ibid.

⁷⁰ Credit and borrowing in South Africa op cit (n54) 16.

⁷¹ Credit and borrowing in South Africa op cit (n54) 17.

⁷² Ibid.

cent are financially excluded.⁷³ These figures are as a result of the lack of access to infrastructure, the banks, transportation and low income. 29 per cent of the adults who use financial products and services, have credit or loan products, this figure is significantly lower for HDI (21 per cent).⁷⁴ In 2012, the number of credit active adults had reduced significantly from 2010 and 2011 (12 per cent and 27 per cent respectively).⁷⁵

The HDI financial services consumption is distributed as follows: 10 per cent of the borrowing occurs from family or friends, 5 per cent from store cards, 3 per cent borrowing from a *stokvel*⁷⁶ or society and 1 per cent borrowing each from an employer, bank, local *spaza*, *mashonisa*⁷⁷ or colleague.⁷⁸

1.4 Essential aspects of the new consumer regulation.

Legislative control of consumer credit is a phenomenon that emerged at the end of the nineteenth century as a result of technological development and a gradual reaction against the laissez—faire philosophy previously prevailing.⁷⁹ Thus, consumer credit law in South Africa has the privilege of adopting the best practices.

‘Consumer protection is an integral part of a modern, efficient, effective and just market place.’⁸⁰ As discussed above the South African credit landscape is unique as a result of the effects of the apartheid legacy that are still prevalent. Consumer policy in South

⁷³ Ibid.

⁷⁴ Credit and borrowing in South Africa op cit (n54) 20.

⁷⁵ Credit and borrowing in South Africa op cit (n54) 19.

⁷⁶ Stokvel is an informal savings club with other people. Financial Diaries ‘Investigation the financial lives of the poor: findings in brief’, available at <http://www.financialdiaries.com/files/Findings%20in%20brief.pdf>, accessed 20 February 2014.

⁷⁷ Xhosa translation for moneylender. *Mashonisa* are township lenders who lends out his/her own money for profit. Financial Diaries supra (n76).

⁷⁸ Credit and borrowing in South Africa op cit (n54) 20.

⁷⁹ Goode op cit (n33) 5.

⁸⁰ Department of Trade and Industry op cit (n22) 4.

Africa must promote the 'equitable consumption of goods and provide vulnerable consumers with rights.'⁸¹ The cornerstones of South African consumer policy are the constitutional principles of equality and non-discrimination therefore every provision in such legislation must promote these two principles.⁸² The ideal South African consumer policy and law reform must be able to address not only this but must also be able to respond to new emerging challenges and opportunities.⁸³ 'Increased cross border trade, e-commerce and other new trading methods resulting from globalization and technological advancement require the government to find innovative ways to protect and promote the interests of consumers.'⁸⁴

The NCA was enacted to provide an answer to this problem however, whether it is a responsive, flexible, simple legislative and regulatory framework is a contentious issue that is a consideration in this discourse.⁸⁵ The new legislative regime ought to have provided for credible and easily accessible enforcement mechanisms especially to vulnerable and rural consumers providing for access to advice, counselling and legal support in general.⁸⁶ Consumer protection geared at providing effective enforcement and redress must ensure that there are awareness and education programs, early warning systems, dispute resolution and complaints handling system.⁸⁷ Enacting current and revolutionary consumer policy was not only as a result of the above-discussed factors but also a means to put into effect international guidelines and principles such as the United Nations Guidelines for Consumer Protection.⁸⁸ Furthermore, it was also a response to the growing global consumer rights movement that continues to gain momentum.

⁸¹ Department of Trade and Industry op cit (n22) 9.

⁸² Ibid

⁸³ Department of Trade and Industry op cit (n22) 4.

⁸⁴ Ibid

⁸⁵ Ibid.

⁸⁶ Department of Trade and Industry op cit (n22) 6.

⁸⁷ Department of Trade and Industry op cit (n22) 7.

⁸⁸ Department of Trade and Industry op cit (n22) 9.

1.5 The National Credit Act.

The extensive credit law review process began in 2002 and resulted in the NCA that was signed into law by the President on 15 March 2006. Majority of the provisions in the Act were effective on 1 June and 1 September 2006.⁸⁹ The NCA has a much broader application and seeks to provide more extensive protection than the previous legislative regime. The Act seeks to promote and advance the social and economic welfare of all South Africans, and to promote a fair, transparent, competitive, efficient, sustainable, responsible, and accessible credit market for all, particularly those who have historically been unable to access credit sustainable market conditions.⁹⁰ In addition, it prohibits unfair credit marketing practices, and provides for improvement of consumer credit information.⁹¹ The Act encourages responsible borrowing, discourages over-indebtedness and reckless lending and provides for a consistent and harmonized system of debt restructuring enforcement and judgment.⁹² The Act sets out to provide a single legislative regime for all credit agreements, however, it acknowledges their inherent differences and attempts to accommodate them.

The purposes of the Act that are important for this research are as follows:

- i. Dealing with and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all his or her responsible financial obligations;⁹³
- ii. Providing for a consistent and accessible system of consensual resolution of disputes that arise from credit agreement;⁹⁴

⁸⁹ Proclamation No. 22, Commencement of the National Credit Act 34 of 2005, Government Gazette 28824, 11 May 2006.

⁹⁰ S 3.

⁹¹ Preamble of the NCA.

⁹² S 3(c) (i) and 3(i)

⁹³ S 3(g).

⁹⁴ S 3(h).

- iii. Providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, that places greater importance on the eventual satisfaction of all responsible consumer obligation incurred under credit agreements.⁹⁵

Chapter 4 of the Act discusses consumer credit policy and addresses over-indebtedness and reckless credit in Part D. Of importance to this discourse are debt review, over-indebtedness and s 86(10). In terms of s 79, over-indebtedness occurs when a consumer is or will be unable to satisfy in a timely manner all the obligations under the credit agreements having regard to various factors.

Whereas debt review can be defined as the process by which a debt counsellor may declare a consumer as being over-indebted and obtains a court order by the Magistrates' Court confirming:⁹⁶

- a. The declaration of reckless credit for credit agreements and/or
- b. Re-structure obligations under credit agreements by-
 - i. Extending the period of the arrangement of the agreement and reducing the amount of each payment due accordingly;
 - ii. Postponing, during a specified period, the dates on which payments are due under the agreement;
 - iii. Extending the period of the agreement and postponing, during a specified period, the dates on which payments are due under the agreements;
 - iv. Recalculating the consumer's obligations because of contraventions of unlawful agreements and provisions, disclosure, form and effect of credit agreements or collection and repayment practices.

Section 86(10), states that

'If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-

- (a) the consumer;
- (b) the debt counsellor; and
- (c) the National Credit Regulator,

⁹⁵ S 3(i)

⁹⁶ S 86(7)(c)(i) and (ii).

at any time at least 60 business days after the date on which the consumer applied for the debt review.’

The validity and interpretation of s 86(10) of the NCA has been confirmed by the Supreme Court of Appeal in the *Collet* judgment. The confusion that existed amongst the lower court judges in matters concerning this provision has been cleared. However, this decision ought to be in line with the precedent and the purpose and the object of the Act. The binding force of the *Collet* judgment could have disastrous effects if it was incorrectly decided and could potentially defeat the purpose of having a statute that rectifies the imbalances that existed between the consumer and credit provider; and provides for debt review in the manner it does.

Prior to the enactment of the NCA, there was a need for legislation that fully appreciated the level of over-indebtedness in the country. The new legislation had to strike a balance between the need to ensure that credit providers did not abuse the system and cheat consumers and the need for credit providers not only to recover their capital but also to make a profit. This is the background against which s 86(10) must be considered.

CHAPTER 2

DEBT REVIEW IN SOUTH AFRICA

2.1 METHODS OF DEBT REVIEW.

As discussed in Chapter 1 many poor South Africans have been enticed in the recent years to enter into credit agreements that they could not afford. Thus debt review provides an invaluable service that is instrumental in curbing this.

Since the enactment of the NCA, s 86 has been scrutinised. Naturally, a procedure that potentially could prevent one from enforcing its rights, or allow for restructuring obligations under a credit agreement, would attract the attention it has. Procedural clarity has been the central theme of most cases concerning debt review.

On a plain reading of s 86, debt review is a process by which a debt counsellor may declare a consumer as being over-indebted⁹⁷ and obtains a court order by the MCA confirming:

- c. The declaration of reckless credit for credit agreements and/or
- d. Re-structure obligations under credit agreements by-
 - v. Extending the period of the arrangement of the agreement and reducing the amount of each payment due accordingly;
 - vi. Postponing during a specified period the dates on which payments are due under the agreement;
 - vii. Extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreements;
 - viii. Recalculating the consumer's obligations because of contraventions of unlawful agreements and provisions⁹⁸, disclosure, form and effect of credit agreements⁹⁹ or collection and repayment practices¹⁰⁰.

⁹⁷ As defined in Chapter 1.

⁹⁸ Chapter 5 Part A.

⁹⁹ Chapter 5 Part B.

¹⁰⁰ Chapter 6 Part A.

Some writers are of the view that the NCA introduces new forms of assistance to debtors who are over-committed.¹⁰¹ Debt review is not a new concept in South Africa. Although debt review was not addressed in either the Usury Act or Credit Agreements Act, the MCA and the Insolvency Act make provision for similar procedures as discussed below.

2.2 VOLUNTARY RE-ARRANGEMENT.

This process allows a debtor faced with debt problems and its creditor(s) to reach a compromise or private arrangement for repayment of a debt(s) over a specified time period which would result in partial or full discharge.¹⁰² It is also referred to as voluntary distribution in the case where it results in rescheduling of payments.¹⁰³ It is a voluntary process and creditors cannot be compelled to enter or participate in this process. This is arguably the oldest form of debt review which manifests itself in different aspects of commercial law and industry.

Voluntary arrangement can be employed before the debt collections procedures in the MCA are employed. Under the NCA, voluntary rearrangement is not prohibited and can be employed by the parties to the credit agreement before an application for debt review and once the application is rejected as discussed below. Over the years voluntary rearrangement has played a key role in assisting over-indebted consumers and thus evolved to become an essential component in debt collection and possibly dispute resolution.¹⁰⁴

As a result of the fact that it is a voluntary process, it is susceptible to abuse. A power imbalance between the parties and absence of regulation were the key challenges to

¹⁰¹ JM Otto *The National Credit Act Explained* 2ed (2010) 3, C van Heerden in JW Scholtz *et al Guide to the National Credit Act* (2008) par 11-2.

¹⁰² A Boraine in M Kelly-Louw, JP Nehf and P Rott *The future of consumer credit regulation* (2008) 195.

¹⁰³ Ibid.

¹⁰⁴ Boraine op cit (n102) 195 states that “such an arrangement may follow mediation or other assistance rendered by an attorney or a paralegal.

effective voluntary arrangement. The need for statutory debt review was therefore evident.

2.3 FINANCIAL INQUIRY IN TERMS OF THE MAGISTRATES' COURT ACT.

Sections 57 and 58 of the MCA provide for means by which a defendant (consumer in terms of the NCA) would make payments in instalments. Procedures in terms of s 65, 65A, 65J and 74 of the MCA, require a financial enquiry and to this extent amount to debt review. Sections 57 and 58 deal with an admission of liability and consent to judgment in the Magistrates' Court, s 65 deals with debt collection while s 74 addresses the procedure for administration orders. Unlike the s 57 procedure, s 58, 65 and 74 are court based procedures, which are time consuming. Nonetheless, the procedures provide some assistance to over-indebted debtors.

Although the above mentioned sections act as means of debt review, the MCA aims to consolidate and amend the law relating to the Magistrates' Court and not to provide for such means.¹⁰⁵ Providing debt review is not an aim of the MCA as envisioned by the NCA, it is a coincidence that by providing for means of debt collection, debt review occurs.

2.3.1 Section 57 and 58.

The procedures contained in the above mentioned sections essentially codified alternatives to the common law settlement procedures.¹⁰⁶ Section 57 allows a debtor to make an undertaking to pay either a lump sum or instalment after making a written admission of liability. The debtor either admits liability for the entire debt claimed or another amount upon receipt of letter of demand or service of summons. If a debtor fails

¹⁰⁵ Preamble of the MCA.

¹⁰⁶ S Pete, D Hume, M du Plessis and R Palmer *Civil Procedure: A practical guide* 2ed (2011) 373.

to meet its obligation, the creditor may obtain judgment against it.¹⁰⁷ In terms of s 58, a debtor upon receipt of a letter of demand or service of summons demanding payment of a debt, consents in writing to judgment for amount of debt and costs claims. The plaintiff will be able to request a judgment against the defendant for the amount of the debt and costs.

Both procedures are quick, simple and cheap in comparison to the other means of debt review. In addition, the absence of a jurisdictional limit for the procedures entails that an over-indebted debtor can obtain debt rearrangement for all debts where it has received a letter of debt or has been served summons as long as the jurisdictional requirement of the Magistrates' Court are met.

2.3.2 Section 65.

Section 65¹⁰⁸ provides for a financial inquiry after the court has given judgment for the payment of a sum of money but before the issue of a notice under s 65A (1). The section requires that the judgment debtor makes a written offer to the judgment creditor to pay the judgment debt in specified instalments or otherwise. Upon receiving such an offer, the judgment creditor or its attorney have the option of accepting it. If accepted, the clerk of the court, at the written request of the judgment creditor or its attorney, accompanied by the offer, orders the judgment debtor to pay the judgment debt in accordance with its offer or in specified instalments. Such order shall be deemed to be an order of the court mentioned in s 65A (1).

The above mentioned financial inquiry is a means of debt review as it allows for variation of a judgment debtor's instalment amounts by means of a written offer which

¹⁰⁷ S 57(2) sets out the steps taken by the registrar or the clerk in the Regional Magistrates' Court and the Magistrates' Court in order to enter judgment against the debtor (defendant).

¹⁰⁸ S 65 substituted by s 2 of Magistrates' Courts Amendment Act 63 of 1976.

can be varied by the judgment creditor or its attorney. This is only achieved through mutual consent following an indirect inquiry into the prevailing circumstances of the judgment debtor. This procedure is both cost and time effective as it occurs before the issue of a notice in terms of s 65A (1) which is discussed below and is handled administratively by the clerk of the court, therefore requiring limited court time.

2.3.3 Section 65A (1).

Section 65A(1) allows for a judgment debtor to be summoned by a notice to appear before the court in chambers on a specified date, in order for the court to enquire into its financial position and make an order as it deems just and equitable. Before engaging in this procedure, two requirements need to be fulfilled. Firstly, the court must have given judgment for the payment of a sum of money or payment in specified instalments. Secondly, such judgment or order must have remained unsatisfied for a period of ten days from the date on which it was given, or on which it became payable, or from the expiry of the period of suspension ordered in terms of s 48(e).

On the day stated in the s 65A(1) notice, a judgment debtor who appears before the court presents oral evidence relevant to its financial situation. Sections 65D (4) (a) and (b) further states the factors that are considered when judging its ability to pay a debt. These factors include the nature of the debtor's income, amounts needed for necessary expenses, and the amounts needed to make periodical payments in terms of other court orders or other commitments.

Section 65D(5) states that the court has the discretion to refuse to take into account periodical payments made by the debtor in terms of a credit agreement, as defined in s 1 of the NCA. In such a case a complete picture of the judgment debtor's relevant financial circumstances is not taken into account. Failure to take into account the judgment debtor's obligations in terms of such an agreement undermines the purpose of

having a procedure such as this. Effective debt review requires an accurate calculation of the judgment debtor's disposable income thereafter an amount to be paid to creditor can be determined.

2.3.4 Section 65J.

Section 65J provides for an emoluments attachment order which entails that the court may order the employer of a judgment debtor (the garnishee) to pay a certain amount of the judgment debtor's salary on a regular basis to the judgment creditor. Sections 65J (2) (a) and (b) require that the judgment debtor consents to the emoluments attachment in writing. In addition, the judgment creditor or an appointed attorney must file with the clerk of the court an affidavit or an affirmation indicating the amount of the judgment debt and the costs, if any, incurred since the date of the judgment. The affidavit or affirmation must also state the balance owing.

On issuing and serving of the emoluments attachment order to the garnishee, a predetermined amount must be stated, this is the amount deducted from the judgment debtor's salary by the garnishee and paid over to the judgment creditor at the end of the predetermined period.¹⁰⁹ In essence, this process allows the judgment debtor to discharge its debt by way of instalments as opposed to a lump sum or instalments as previously agreed. As such the initial payment plan is altered- this is the essence of debt review.

Section 65J further provides another procedure for debt review by the court. The court can suspend, amend or rescind the order when the judgment debtor shows that after the deduction there are insufficient means available to support the judgment debtor and any dependants.¹¹⁰ In this regard, the granting of an emoluments attachment order does not prohibit any further financial inquiry if the judgment debtor's circumstances change.

¹⁰⁹ S 65J (4).

¹¹⁰ S 65J (6).

This ensures that the purposes of the financial inquiry are achieved as the court ensures that the judgment debtor pays off the debt but still has sufficient means to survive. However, as Bentley states, there have been various problems with this process, most of which go to the heart of effective debt review and have resulted in the Banking Association of South Africa's commitment not to use these orders against credit defaulters.¹¹¹

2.3.5 Section 74.

Section 74 provides for an application for an administration order which acts as a means of debt review for debtors whose debts amount to less than the amount stated by the Minister in the Government Gazette, which at present is R50 000.¹¹² This process is available to a debtor who has a regular income but is unable to pay the amount of any judgment obtained against it in court, or meet its financial obligations. Furthermore, the debtor should not have sufficient assets capable of attachment to satisfy such judgment obligations. This procedure provides for a rescheduling of a debtor's debts without sequestrating the debtor's estate hence it is described as a modified form of insolvency proceedings.¹¹³

In terms of the administration order, the court appoints an administrator to take control of the debtor's financial affairs and to manage the payment of debts due to creditors.¹¹⁴ After deducting the necessary expenses and its remuneration (which may not be more

¹¹¹ B Bentley 'Separating the baby and the bath water - garnishee and emoluments attachment orders' 2013 *De Rebus* 22. See further: University of Pretoria Law Clinic 'The incidence of and the undesirable practices relating to garnishee orders in South Africa.', available at <http://www.ncr.org.za/publications/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 20 March 2014, 25-29. 'The incidence of and undesirable practices relating to garnishee orders – a follow up report.', available at <http://web.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 15 March 2014, 31-60.

¹¹² GN R3441 of 31 December 1992.

¹¹³ C Theophilopoulos, A Rowan, CM van Heerden *Fundamental Principles of Civil Procedure* 2ed (2008) 396.

¹¹⁴ S 74E(1).

than 12.5 per cent of the collected amount), the administrator will make a regular distribution in weekly or monthly instalments or otherwise out of the amount received from the debtor.¹¹⁵ In addition, the administrator may retain a maximum of 25 per cent of the amount collected (capped at R600) which may be used towards unforeseen costs that the administrator may incur if the debtor defaults.¹¹⁶

The application for administration must be accompanied by the prescribed statement of affairs in which details pertaining to the creditors and amounts owed are stated. All debts listed in the statement of affairs are deemed to be proved but are subject to any amendments the court may make.¹¹⁷

During the hearing of the application for administration, the court or any creditor or legal representative may question the debtor in regard to the assets and liabilities, present and future income including the spouse's income, standard of living and possibilities of economising ;and any other relevant matters.¹¹⁸ Thereafter, a weekly or monthly amount payable is determined.

This procedure, however, excludes from its ambit debts that become due and payable in future for example, mortgage bonds and assets subject to credit agreements. In essence, an administration order granted in terms of this section does not take full account of the judgment debtor's circumstances. As a result the benefits that can be derived from it are limited as it is probable that in some cases the debtor will not finish paying off its debts because the debts excluded from the ambit of the administration order place an additional burden on the debtor's pocket. As a result, effective debt review is not achieved.

¹¹⁵ S 74L(2).

¹¹⁶ S 74L(1)(b) MCA read with rule 48(4) of the Magistrates' Court Rules.

¹¹⁷ S 74B(1)(b).

¹¹⁸ Theophilopoulos op cit (n113) 397.

Nonetheless, the legislature's dedication to alleviating over-indebtedness is still evident. The administration order affords the judgment debtor some advantage, it is protected from legal action.¹¹⁹ Section 65I further states that the administration order must be disposed of before the s 65 *in camera* hearing can proceed; which indicates the legislature's dedication to ensuring the accessibility of debt review.

2.3.6 Concluding remarks on financial inquiries in terms of the MCA.

From the above discussion of financial inquiries in terms of the MCA, one cannot deny the legislature's dedication to alleviating over-indebtedness. Aside from the fact that some of the above mentioned procedures fail to take full account of the debtor's position and are heavily reliant on the court's time, the procedures, in particular, administration orders played a central role in attempting to alleviate over-indebtedness prior to the NCA. However, the major shortfall of these provisions is that their ambit excluded credit agreements as defined in the NCA which in the light of the statistics discussed in Chapter 1 leaves many of the over indebted consumers without legal recourse.

One of the major distinguishing factors of the procedures discussed above is that apart from the s 74 administration orders, the procedure that results in the financial inquiry taking place is normally initiated by the judgment creditor. This results in a power imbalance between the parties. Essentially, the judgment debtor is at the mercy of the judgment creditor, if it does not initiate proceedings to recover the debt; the financial inquiry will not take place. Furthermore, the procedures being heavily reliant on the court's resources and time makes the process unavailable to those who can not afford

¹¹⁹ N Campbell and S Logan *The Credit Guide: manage your money with the National Credit Act* (2008) 109.

legal services. In addition, they do not foster the objectives of the debt review¹²⁰ which are only achieved if the process is accessible to the masses that need it.

Boraine states that the complaints regarding the ‘administration industry’, a debt review mechanism, can be divided into four distinct categories being the:¹²¹

- a. wide range of practical issues pertaining to the application of s 74;
- b. wide range of alleged abuses of s 57, 58 and 74;
- c. consumer-related issues stemming from micro loans, debt collection, blacklisting and garnishee orders;
- d. unregulated profession of the administrator.

It is imperative that the weaknesses of the financial inquiries in terms of the MCA are rectified by the NCA’s debt review in order for it to play a central role in alleviating over-indebtedness.

2.3 SEQUESTRATION.

The Insolvency Act makes provision for compulsory sequestration and voluntary surrender in sections 9(1) and 3(1) respectively. In the case where a creditor applies to court for the sequestration of the debtor’s estate it amounts to compulsory sequestration. Voluntary surrender occurs if the debtor, itself, or its agent applies to court for acceptance of the surrender of its estate. Although the requirements of voluntary surrender and compulsory sequestration are different, the consequences are the same.¹²²

¹²⁰ As stated in the NCA.

¹²¹ Boraine op cit (n102) 199.

¹²² In order to qualify for voluntary surrender in terms of s 3 a debtor’s estate must in fact be insolvent, must own realizable property of sufficient value to defray all costs of the sequestration in terms of the Act which are payable out of the residue of the estate and the sequestration must be to the advantage of the creditors. For a court to order compulsory sequestration in terms of s 10, the applicant must have a claim

In deciding whether sequestration is the right course of action, the court has to determine whether it is in the best interests of the debtor's creditors.¹²³ The available funds for distribution will only be known once the estate assets have been sold which presents difficulties in the practical application of the best interest criterion.¹²⁴ Although outdated, research results identified that in 1989 creditors received a dividend in 28.6 per cent of the cases and contributed towards the cost of sequestration in 40 per cent of the cases, rendering the efficacy of this procedure questionable.¹²⁵ If the debtor's creditors are not pressing it for payment and are willing to give it time or to accept monthly instalments, the court has the discretion to reject the application.¹²⁶ Evidently, the granting of such application is dependent on the facts of each case. In addition, the court does not grant this relief unless the debtor owns sufficient assets that can be sold to pay all costs of the sequestration in terms of this Act which means that in practice, one can be too poor to be sequestrated.

In terms of s 3(3) the court before accepting or declining the voluntary surrender, may require a petitioner or any other person to appear in court in order to allow for an inquiry into the debtor's financial circumstances allowing the court to gain an in-depth understanding of its estate. Upon the court granting the sequestration order, the insolvent's assets will be sold and all the creditors who submit and prove claims will be paid a dividend and the balance of the debt will be written off.¹²⁷ The creditors who make a claim against the debtor's insolvent estate contribute towards the costs of sequestration and only when there is money left over do they share what is left between them, however, the debtor receives none of the proceeds.¹²⁸ Sequestration can result in a

that entitles it to apply for the same. In addition, the debtor must have committed an act of insolvency or must be insolvent and there must be reason to believe that sequestration will be to the advantage of the creditors.

¹²³ S 6(1).

¹²⁴ Boraine op cit (n102) 195.

¹²⁵ Working Paper 29 Project 63 'Review of the law of Insolvency: Prerequisites for alternatives to sequestration (1989) Schedule 3.

¹²⁶ *Ex parte Kruger* 1928 (CPD) 233.

¹²⁷ Campbell op cit (n119) 109.

¹²⁸ Ibid.

large percentage of a consumer's debt being written off, which is an invaluable benefit to the debtor.¹²⁹ Sequestration as a result allows debt review because the payments to the creditors are revised (dividends awarded) followed by debt discharge.

Sequestration has a wider ambit than some of the provisions providing for debt review in the MCA and the NCA, as a result it is a more effective means of debt review. Included in the insolvent's estate is the property at the date of sequestration and any property acquired or accruing to it during sequestration.¹³⁰ As a result of this far-reaching ambit, the insolvent estate is vested in the Master until a trustee is appointed, thereby limiting the insolvent's freedom to utilise its assets.¹³¹ In addition, sequestration has an effect on the property of the insolvent's spouse.¹³² Furthermore, it places conditions on the insolvent's personal and professional contractual capacity.¹³³ Sequestration places a heavy burden on the insolvent because the limitations placed on it and its property, its spouse's estate, and the stigma attached to the process. However, the rehabilitation process affords the insolvent a fresh start.¹³⁴

The key distinction between this debt review process and those provided for by the NCA and MCA is that sequestration does not only provide for debt rearrangement but also discharge in all cases.¹³⁵ Its effects makes this procedure suitable for extremely over-indebted consumers and leaves room for milder forms of review as provided for in the MCA and NCA for those not falling within its ambit.

The Insolvency Act provides for two other means of debt review, common law compromise and statutory composition. A debtor facing financial difficulty or whose

¹²⁹ Ibid.

¹³⁰ S 20(2).

¹³¹ S 20(1) (a).

¹³² S 21.

¹³³ S 23.

¹³⁴ S 124.

¹³⁵ The NCA debt review provides for discharge only in cases where the court finds that there was reckless granting of credit. This will be discussed further in Chapter 3, 4 and 5.

estate has been provisionally sequestrated (even before this) can still enter into a compromise (often referred to as common law compromise)¹³⁶ in writing with its creditors.¹³⁷ This process is based on a contract thus it requires approval of all the creditors.¹³⁸ This process releases the debtor from its debts without going through sequestration.¹³⁹ Statutory compromise is provided for in s 119 of the Insolvency Act. In terms of this process which takes place under the supervision of the trustee, and the decision of the majority of the creditors binds the dissenting minority.¹⁴⁰ Like sequestration, both statutory composition and common-law compromise provide for a dividend payment to the creditors and thereafter debt discharge.

2.4 DEBT REVIEW UNDER THE NCA.

The NCA aims to discourage the granting of reckless credit and alleviate over-indebtedness.¹⁴¹ It requires the credit provider to evaluate a prospective debtor's creditworthiness before credit is granted.¹⁴² In addition, it provides for a court based debt review process in terms s 85 and 87, and a predominantly out-of-court based debt review process in terms of s 86. The Act provides that the provisions dealing with over-indebtedness and rescheduling of debt do not apply to juristic persons in their capacity as consumers in terms of a credit agreement.¹⁴³ It is debatable whether this applies to trusts as well. Van Heerden submits that in the instances where a trust qualifies as a natural person it will be able to access these measures.¹⁴⁴ Debt review and debt rearrangement apply to all debts including lump sums payable immediately or within a reasonable

¹³⁶ R Sharrock, R Smith and A Van Der Linde *Holckly's Insolvency Law* 9ed (2012) 203.

¹³⁷ *Mahomed v Lockhat Brothers & Co Ltd* 1944 (AD) 230 at 241.

¹³⁸ Sharrock, op cit (n136) 203.

¹³⁹ Ibid.

¹⁴⁰ S 119.

¹⁴¹ S 3.

¹⁴² S 81(2)(a).

¹⁴³ S 78(1).

¹⁴⁴ Van Heerden op cit (n101) par 11-3.

period of demand.¹⁴⁵ It is not limited to the consumer's periodic obligations arising from instalment contracts.¹⁴⁶

Section 86 makes provision for the consumer to apply for debt review in the prescribed manner and form in order to be declared over-indebted. However, the consumer does not have the liberty to do so if the credit provider under the credit agreement has already proceeded to take steps contemplated in s 129, the procedure required before debt enforcement. The National Credit Amendment Act¹⁴⁷ s 26 incorporated the view of the court in *Firststrand Bank Ltd t/a Honda Finance v Owens*¹⁴⁸ which states that a consumer may not apply for debt review if the credit provider has taken steps in s 130. The effect of which is that s 86 now excludes from its ambit credit agreements subject to debt procedures in court (s 130) rather than those that are subject to the procedures before debt enforcement (s 129). This widens the ambit for debt review furthering the aims of the NCA.

The debt review procedure consists of two stages, the first is conducted with the assistance of the debt counsellor and the other in court. In terms of s 86, the debt counsellor may require the consumer to pay an application fee not exceeding the prescribed amount (currently R50) before accepting an application.¹⁴⁹ It is further prohibited from accepting or requiring a fee from the credit provider in respect of an application. On receipt of an application, a debt counsellor must provide the consumer with proof of receipt of the application and notify the credit providers listed in the

¹⁴⁵ *BMW Financial Services South Africa (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD) para 28. A comprehensive list of agreements debt review applies to can be found in regulation 24(cc) (iii) of the National Credit Regulation 2006, Government Notice R489.

¹⁴⁶ *Otto* op cit (n101) 62.

¹⁴⁷ 19 of 2014.

¹⁴⁸ 2013 (2) SA 325 (SCA) para 11. The court in casu approved the views of the court in *Changing Tides 17 (Pty) Ltd v Grobler* 2011 ZAGPHC 84.

¹⁴⁹ *Campbell* op cit (n119) 98.

application and every registered credit bureaux. The application fee is not the only fee required by the debt counsellor, there are various costs to be paid by the consumer.¹⁵⁰

Section 86(6) requires that upon the debt counsellor accepting the application by the consumer, it must determine in the prescribed manner and within 30 business days from the date of the application, whether the consumer appears to be over-indebted.¹⁵¹ In a case where the consumer seeks a declaration of reckless credit, it must determine whether any of the consumer's credit agreements appear to be reckless.

If the consumer's application is rejected, the debt counsellor must advise the consumer that it may with leave from the Magistrates' Court, apply directly within 20 business days (the period can be extended if good cause shown) for an order to be declared over-indebted, have an agreement declared reckless and/or have its debt restructured.¹⁵² After completing the assessment, the debt counsellor must submit form 17.2 to all affected credit providers and all registered credit bureaux.¹⁵³

If the debt counsellor finds that the consumer concerned is over-indebted, the consumer is placed under debt counselling, in which case it does not have to deal with its creditors directly.¹⁵⁴ In this situation, 'the debt counsellor's role is that of a neutral, statutory

¹⁵⁰ The application fee for debt review is pegged at R50. The National Credit Regulator 'Fees Guidelines', available at http://www.ncr.org.za/pdfs/Guidelines/2011/Debt_Counselling_Fee_Guidelines.pdf, accessed on 2 April 2014, state the following approved fees:

- a. Rejection fee- R300 (excluding VAT (value added tax))
- b. Restructuring fee of accepted applications for both single applications and joint applications at R6000 (excluding VAT)
- c. Monthly-care fee payable in the 2nd month after the re-structuring fee referred to above is paid. It is pegged at 5% up to a maximum of R400 (excluding VAT) for the first 24 months thereafter 3% to a maximum of R400 (excluding VAT).
- d. Legal fees for the consent order are R750. The NCR also approved other legal fees, the costs of which are subject to the negotiation of the two parties but does not state specifically what the costs are.

¹⁵¹ Regulation 24(6).

¹⁵² Regulation 26(1). The consumer must complete form 18 when making an application to court.

¹⁵³ Regulation 24(10). The debt counsellor in terms of regulation 25(6) must issue a statement advising the consumer of this.

¹⁵⁴ Campbell op cit (n119) 102.

functionary who does not seek to advance any particular party's cause.'¹⁵⁵ Upon accepting such an application, the debt counsellor must issue a formal rearrangement proposal to the creditors on the consumer's behalf. A debt counsellor may make recommendations to the Magistrates' Court in terms of s 86(7) as listed above.¹⁵⁶ In addition, it may also recalculate the consumer's obligation because of contravention of Part A or B of Chapter 5, or Part A of Chapter 6.¹⁵⁷ Upon making this finding, the debt counsellor must refer the application to the Magistrates' Court.¹⁵⁸ It is during this process that, a credit provider has a right to terminate debt review regardless of whether the matter has been referred to the Magistrates' Court or not. The outcome of the debt review process is eventually in the hands of the Magistrates' Court if the proposal is not consented to by all the credit providers and the consumer.¹⁵⁹

Section 86 does not only deal with situations where the consumer is already over-indebted, the debt counsellor can request the respective credit providers to voluntarily consider and agree on a plan of debt rearrangement if the consumer is not over-indebted but is likely to become over-indebted.¹⁶⁰

Section 85 allows the court to declare a consumer to be over-indebted and provides relief despite any law or agreement to the contrary. The debt review process in this case is streamlined as the court need not wait for the recommendations of the debt counsellor to make a formal rearrangement of the consumer's debt.¹⁶¹ The court may refer the matter directly to a debt counsellor if it is alleged that the consumer under a credit agreement is over-indebted.¹⁶² In terms of this section, reference 'to the court' entails that this process is not limited to the jurisdiction of the Magistrates' Court alone but also the High

¹⁵⁵ M Kelly-Louw and PN Stoop *Consumer Credit Regulation in South Africa* (2012) 339.

¹⁵⁶ Chapter 2.1 herein.

¹⁵⁷ Unlawful agreements and provision and disclosure, form and effect of credit agreements are dealt with Part A and B of Chapter 5 respectively. Part A of Chapter 6 contains collection and repayment practices.

¹⁵⁸ S 86(8)(b).

¹⁵⁹ Kelly-Louw op cit (n155) 338.

¹⁶⁰ S 86(7)(b).

¹⁶¹ S 85(b).

¹⁶² S 85(a) and 86(11).

Court.¹⁶³ Where the High court refers the matter to a debt counsellor, the recommendation would be made to the High Court.¹⁶⁴

A consumer has access to debt review in three ways: referral by the court in terms of s 85, voluntarily in terms of s 86(1), and referral by a credit provider in terms of s 129. Although, the court plays a vital role, most of the work ought to be done by the debt counsellor. Essentially, if the process works as envisioned, the court ought to simply review the proposal agreed to by both parties before making it an order of court if it agrees with the application. To this extent, the court's role ought to be minimal but does not imply that the court need not apply its mind to the case at hand. Furthermore, the debt review process is available at various stages to the consumer which increases its availability to over-indebted consumers.¹⁶⁵ In addition, the recommendations which the debt counsellor can make aim to foster the satisfaction of the debt by the consumer, this is in line with the aims of the NCA.

Section 86 makes it clear that debt review is under the jurisdiction of the Magistrates' Court. However, procedural clarity of this provision was addressed by the High Court (the findings of which were confirmed by the Supreme Court of Appeal in *Nedbank Ltd v National Credit Regulator*¹⁶⁶). The High Court¹⁶⁷ held as follows:

- a. The magistrate fulfils a judicial role in discharging his duties in terms of s 87 of the NCA.¹⁶⁸
- b. A debt counsellor who refers an application to court under s 86(8) (b) and 86(7) (c) is not a litigant but fulfilling a statutory obligation.¹⁶⁹

¹⁶³ *Standard Bank v Payayiotts* 2009 (6) SA 295 (W) para 17.

¹⁶⁴ *Ibid.*

¹⁶⁵ Voluntarily in terms of s 86, prior to debt enforcement in terms of s 129 and by referral of the court s 85.

¹⁶⁶ 2011 (3) SA 581 (SCA).

¹⁶⁷ 2009 (6) SA 295 (GNP).

¹⁶⁸ *National Credit Regulator* supra (n167) page 306.

¹⁶⁹ *National Credit Regulator* supra (n167) page 312.

- c. The Magistrates' Court Act and the Magistrates' Court Rules¹⁷⁰ govern the procedure by which the Magistrates' Court may conduct itself in conducting a hearing¹⁷¹ and making appropriate orders in terms of the NCA.¹⁷² However, the court in *Standard Bank v Panayiotts* held that the High Court would be able to attend to such debt restructuring.¹⁷³
- d. A referral by the debt counsellor as provided in s 86(7)(c) and 86(8)(b) of the NCA to the Magistrates' Court is an application within the meaning of the Magistrates' Court Act and Rules.¹⁷⁴
- e. Service of any documents as contemplated in s 86(7) (c), 86(8)(b) and 87 of the NCA will be treated in accordance with rule 9 of the Magistrates' Court Rules, in the absence of an agreement by the affected parties.¹⁷⁵ The affected parties can agree that service will be by way of email or fax. The Jurisdiction of Regional Court Amendment Act¹⁷⁶ rule 9(3) (f) requires that a referral in terms of s 86(7) (c) or 86(8) (b) of the NCA may cause the referral to be served by registered post or by hand. The referral *in casu* occurs upon service and not upon the issue of the Rule 55 application.¹⁷⁷
- f. A debt counsellor has a duty to assist, should be available and able to render such assistance by furnishing evidence, making submissions regarding its proposal or by answering queries raised by the court if it makes a referral to Magistrates' Court in terms of s 86(7) (c) and 86(8)(b) of the NCA.¹⁷⁸
- g. For the purposes of s 86(7) (c), 86(8) (b) and 87 of the NCA, the Magistrates' Court having jurisdiction in respect of the person of the consumer is the appropriate forum.¹⁷⁹

¹⁷⁰ GG 33487, Notice R740.

¹⁷¹ S 87 of the NCA.

¹⁷² S 86 read with section 87 NCA. *National Credit Regulator* supra (n167) page 321.

¹⁷³ (2009) ZAGPHC 22 para 17.

¹⁷⁴ *Standard Bank v Panayiotts* para 17. The court stated that rule 55 applies.

¹⁷⁵ *National Credit Regulator* supra (n167) page 313.

¹⁷⁶ 31 of 2008.

¹⁷⁷ *SA Taxi Securitisation v Matlala* (2010) ZAGPJHC 70 para. 15. The Supreme Court of Appeal confirmed this in the *Nedbank Ltd* supra (n166) at 25- 28.

¹⁷⁸ *National Credit Regulator* supra (n167) page 314.

¹⁷⁹ *Ibid.*

- h. In regard to referral in terms of s 87, there is no monetary limit on the jurisdiction of Magistrates' Court.¹⁸⁰

Although, many of the uncertainties have been dealt with the High Court in the above case, the legislature must deal with these issues as they relate to *locus standi*, jurisdiction and the manner of service.¹⁸¹ In light of this decision and various other cases that have been decided and have provided procedural clarity on the debt review process, there ought to be a decrease in the number of over-indebted consumers in South Africa so as to evidence the fact that the debt review procedure is working effectively, serving its purpose and achieving the aims of the NCA. However, in light of the statistics elicited in Chapter 1, it is evident that this is not the case. The question that follows relates to what the problems are and is it really an improvement on the previous means of debt review.

2.5 CONCLUSION

Debt review in terms of the NCA is more simplified and is accessible at various stages of the dispute resolution process. Debt review is more accessible to over-indebted consumers, its availability is not limited to before or after court proceedings or through a debt counsellor alone. In addition, as a result of the wide definition of a credit agreement as contained in s 8 of the NCA, the debt review procedure has wide ambit of application. It provides a means by which a consumer who does not meet the stringent requirements of insolvency and is not yet facing serious financial difficulties as in the case of insolvency proceedings can obtain debt rearrangement and discharge if the agreement is found to be reckless. In this regard as with s 74 administration orders, s86 debt review acts as a modified form of insolvency.

¹⁸⁰ *National Credit Regulator* supra (n167) page 315.

¹⁸¹ A Boraine, C van Heerden and M Roestoff "A comparison between formal administration orders and debt review- the pros and cons of these measures and suggestions of law reform (Part 2)" (2012) *De Jure* 254 at 270. The Debt Counselling Regulation 2012 Government Notice 3362 has done so to an extent- Regulation 4 dealing with the application of rule 55 of the Magistrates' Court Rules and Regulation 3 dealing with delivery, compliance and implementation of the court order time period.

Is the debt review in terms of the NCA an improvement from the MCA debt review?

The NCA has reformed the credit industry in various ways, including addressing the procedures relating to debt collection, blacklisting, in addition to attempting to rectify the micro-lender's bad practices. It further rectifies the power imbalance implicit in the provisions of the MCA by affording the consumer the right to initiate debt review.¹⁸² Debt review in terms of the NCA has rectified the issues that arose in regards to the administration profession. The NCA regulates the debt counselling profession and regulates the receipt of funds from consumers in that capacity, a key flaw of the s 74 administration orders.¹⁸³ Boraine states that unregulation profession of the administrator is probably the reason for many of the difficulties experienced with the procedure.¹⁸⁴ In accordance with this view, since the debt counsellors and payment distribution agencies are regulated, the practical difficulties experienced in respect to administration order under the MCA would be minimised under the NCA debt review. Whether these practical difficulties have been resolved is out of the scope of this research. However, in agreement with other researchers' views new problems have arisen¹⁸⁵ - one of which is the subject matter of this research.

In terms of the MCA, s 74 administration orders played a key role in providing for debt review prior to the NCA, however, its jurisdictional limit of R50, 000 leaves a large percentage of the population with very little recourse. Prior to the NCA, in a case where the consumer fell into the category that was outside the MCA's ambit and did not meet the stringent requirement of the sequestration, it was left with very little recourse. As such debt review in terms of the NCA has filled this void to the extent that it applies to credit agreements.

¹⁸² As did the Insolvency Act in providing for both voluntary and compulsory sequestration.

¹⁸³ S 44 and of 46 of the NCA. Regulation 491) (ii), 10 and 11 of the National Credit Regulation.

¹⁸⁴ Boraine op cit (n102) 199.

¹⁸⁵ Roestoff M, Haupt F, Coetzee H and Erasmus M, "The debt counselling process- closing the loopholes in the National Credit Act 34 of 2005" (2009) *PER* 12 247/360.

In attempt to ensure that debt review was available to the over-indebted masses, the debt review application fee was set at R50. Whether this procedure is cost effective in comparison to the MCA debt review is questionable as the cumulative costs of the NCA debt review procedure are high.¹⁸⁶

Is the NCA debt review an answer to the shortfalls of the Insolvency Act debt Review methods?

The South African Law Reform recognised that there was a serious need for a debt review mechanism that would be available to more over-indebted consumers, as a result the Draft Insolvency Bill¹⁸⁷ suggested that insertion of s 74X in the MCA. The section would provide for a pre-liquidation composition procedure amongst the debtor and credit providers which would be binding if accepted by the majority of the creditors (in number and two-thirds in value) of the concurrent creditors who voted for composition. This was meant to resolve the fact that the insolvency procedures were out of reach for many debtors as result of their requirements.

Boraine highlights four shortfalls of this provision which act as a barrier to adequate debt review.¹⁸⁸ Firstly, the Bill did not state how it would relate to administration orders. Was it meant to replace s 74 administration orders? Secondly, was the process meant to service all debtors? Boraine states that it would be available to those who do not qualify for administration or sequestration.¹⁸⁹ Thirdly, the provision did not address situations where pre-liquidation composition did not meet the majority threshold- what relief

¹⁸⁶ See footnote 153 herein. Based on the current fees as contained in the National Credit Regulator Fees Guidelines, a consumer who is under debt review for a period of 18 months must pay R 10,250 to the debt counselor excluding VAT and any legal fees accumulated. The consumer must owe at least R8000 in order for the debt counselor to charge a maximum of R400 in the first 24 months.

¹⁸⁷ 2000.

¹⁸⁸ Boraine op cit (n102) 197.

¹⁸⁹ Ibid.

would such debtors have?¹⁹⁰ Fourthly, this process will be heavily dependent on the court's time which is not ideal considering that the courts are over-burdened.¹⁹¹ Evidently s 74X would not have been an adequate remedy to this problem.

The NCA provides an alternative means of debt review for consumers who do not meet the requirements of the Insolvency Act. In addition, it provides for a milder form of debt review which has more consumer friendly effects on its status and estate. Furthermore, it promotes the satisfaction of all debts and only provides for debt discharge in cases where there was reckless granting of credit. Whether the NCA debt review on its own addresses the main concern that resulted in the Draft Insolvency Bill is debatable.

The state of debt review in South Africa.

As discussed, despite their shortfalls, there are various options available for an indebted consumer. However, as a result of these various options, various issues arise. Firstly, how do the various provisions interact- will debt review in terms of the NCA be sufficient in order to alleviate over-indebtedness in the absence of the various procedures provided for in the MCA especially s 74 administration orders? The South African Law Reform Commission is of the view that debt review in terms of the NCA, on its own, can assist debtors who find themselves in financial distress provided that three issues are resolved.¹⁹² Firstly, a provision affording persons who become over-indebted as a result of delictual claims should be introduced in order to afford such persons the protection afforded by the NCA.¹⁹³ Secondly, a provision addressing non-compliance with rescheduled obligations must be considered.¹⁹⁴ Thirdly, a sunset clause allowing persons

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² South African Law Reform Commission 'Review of administration orders (project 127): Questionnaire on abolition of administration orders', available at <http://www.justice.gov.za/salrc/media/2008%2003%2007%20Media%20statement%20Questionnaire%20Administration%20Orders.pdf>, accessed on 28 March 2014.

¹⁹³ South African Law Reform Commission op cit (n192) 2.

¹⁹⁴ South African Law Reform Commission op cit (n192) 3.

under administration orders should also be considered.¹⁹⁵ Furthermore, a provision that allows for administration orders to lapse upon, the expiry of a specified period after the granting thereof or the coming into operation of amendments to provide for discharge, whichever occurs later.¹⁹⁶ It is submitted that in light of the fundamental differences and challenges discussed above of the various debt review mechanisms, none can exist in isolation. All the debt review mechanisms have different requirements, and are available at different stages of the consumer's debt trap.¹⁹⁷

Secondly, what is the maximum time limit for debt rearrangement or rescheduling? Unlike the debt review procedures under the Insolvency Act¹⁹⁸, the NCA and MCA provisions do not place a time limit for the debt rearrangement. As a result, a consumer can be subject to debt review for an unlimited amount of time. However, unlike the MCA, the NCA debt review procedures are subject to the principle of satisfaction by the consumer of all financial obligations.¹⁹⁹ In addition, the NCA places priority on the eventual satisfaction of all responsible consumer obligations under credit agreement.²⁰⁰ Boraine is of the view that debt review should be developed in accordance with international standards and that there should be a maximum of ten years on the process.²⁰¹

Thirdly, where all the debt review procedures envisioned to be court-based processes? The debt review procedures provided for by the MCA and Insolvency Act are heavily dependent on the court's time and resources. At the time of enactment of the NCA,

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ When the consumer experiences difficulties in making payments before the agreement is enforced (debt review in terms of the NCA), after the agreement has been enforced (debt review in terms of the MCA or section 85 of the NCA) and when it is insolvent but has assets that can be realised in order to make a distribution to the creditors (sequestration in terms of the Insolvency Act).

¹⁹⁸ Once an insolvent estate is liquidated and the dividend has been paid out, he or she enters into rehabilitation.

¹⁹⁹ S 3(g) of the NCA.

²⁰⁰ S 3(i). The use of the word "eventual" does not encourage the satisfaction of debts, as it does not convey the need to make urgent payments.

²⁰¹ Boraine op cit (n102) 203. National Credit Act Regulation and Notices Government Notice 1209 in schedule 2 regulation 17 deals with the time period for which the credit bureau can retain information and not period of debt re-structure.

there was a need for a predominately out of court debt review procedure. It is submitted that in light of the wording of s 86, the legislature intended on rectifying this problem.²⁰² Whether this procedure, in practice, is a predominantly out of court based is debatable.

Although there is vast improvement, there is still room for a debt review mechanism that better serves the South African population.²⁰³ Debt review creates an administrative burden for creditors and is a rather expensive exercise for everyone involved including the state. However, it is a mechanism worth having in a credit market such as South Africa's. As stated above debt review is not new in South African law, but a provision allowing for unilateral termination of the debt review process (s 86(10)) is a new concept. The MCA and Insolvency Act provisions allowing for financial inquiries do not contain similar provisions to s 86(10). This begs the question as to what the purpose, value and aim of s 86(10) in the debt review process is.

²⁰² The debt counsellor does majority of the work, it provides recommendations of debt rearrangement and the analysis of whether the credit agreement was granted recklessly.

²⁰³ See A Boraine op cit (n181) 270-271 for improvements on the debt review process.

CHAPTER 3

LITERATURE REVIEW

In this chapter, the current law will be discussed with particular focus on Supreme Court of Appeal's judgment in the *Collet* case. The judgment is analysed in the context of the consumer's right of access to court, the debt review process and the obstacles encountered in it. Furthermore, discussion of the meaning of good faith in South African law will be engaged in to determine whether the good faith obligation as it is currently provided for is enforceable. A discussion about whether the amendment of s 86(10) addresses the shortfalls highlighted will follow.

3.1.1 *Collet v Firststrand Bank & National Credit Regulator* (2011) (4) SA 508 (SCA).

This case was an appeal against the judgment of Eksteen J in the Eastern Cape High Court, in which he granted a summary judgment against the appellant and an order declaring certain immovable property executable.²⁰⁴ The appellant was in default with her repayments under a mortgage bond, and her failure to pay any or all of the agreed installments resulted in the whole of the outstanding amount becoming due and payable. The appellant successfully applied for debt review in terms of s 86(1) on 4 January 2010, resulting in the debt obligations being in the process of restructure on 15 February 2010.²⁰⁵ Upon refusal of the debt restructuring proposal by credit providers, the debt counsellor referred the matter on 29 March 2010 to the East London Magistrates' Court in terms of s 86(8) of the NCA in order for the appellant to be declared over-indebted or that her debt commitments be rearranged.²⁰⁶

²⁰⁴ *Collet* supra (n3) at 1.

²⁰⁵ *Collet* supra (n3) at 2.

²⁰⁶ *Ibid.*

On 7 April 2010, more than 60 days pursuant to the applicant's application and the referral to the Magistrates' Court, the respondent terminated the debt review in respect of the mortgage bond in terms of s 86(10).²⁰⁷ The hearing before the court in terms of s 87 was set down for 10 June 2010 and later postponed to 12 August 2010.²⁰⁸ Summons were issued on 21 June 2010 and served on the appellant on 1 July 2010.²⁰⁹

The issue before the court was 'whether a credit provider is entitled to terminate debt review in terms of section 86(10) after the debt counsellor has referred the matter to the Magistrates' Court for an order envisaged by sections 86(7)(c) and 87(1)(b) and while the hearing in terms of section 87 is still pending.'²¹⁰ Essentially, the court had to decide when 'the entitlement to terminate the debt review arises and ends, as well as the meaning of section 86(11)'.²¹¹

In deciding this issue, the court discussed the jurisprudence concerning the matter focusing on Griesel J's judgment of the *Wesbank a division of First Rand Bank Ltd v Papier (with the NCR as Amicus Curiae)*.²¹² Malan JA was of the view that Griesel J correctly followed the contextual approach and that consideration of the section appearing in Part D of Chapter 4 of the Act which contain debt review and debt rearrangement was appropriate.²¹³ Griesel J further stated that the 'debt counsellor has 30 days within which he ought to determine whether the consumer is over-indebted'.²¹⁴ In a case where 'the debt counsellor concludes that the consumer is not over-indebted, he must advise the consumer of his right to approach the court within a further 20 business days for the necessary order'.²¹⁵ In addition, neither the NCA nor the regulations contain a period for referral to the court, however, having regard to the context, the consumer or

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ *Collet* supra (n3) at 6.

²¹¹ Ibid.

²¹² 2011 (2) SA 365 (WCC).

²¹³ *Collet* supra (n3) at 7.

²¹⁴ *Collet* supra (n3) at 8.

²¹⁵ Ibid.

the debt counsellor had a further ten business days in which to approach the court which was insufficient.²¹⁶

Regardless of the correctness of the above approach, Malan JA was of the view that it was limited and stated that

‘A sounder approach is to recognise the express words of section 86(10) which gives the credit provider a right to terminate the debt review in respect of the particular credit transaction under which the consumer is in default, and only when he is default, at least 60 business days after the application for debt review was made.’²¹⁷

Malan JA further stated that in contrast to Griesel J’s finding, the right to terminate the debt review process should not be viewed as ‘derailing’ the process because it is the consumer that it is in breach of contract not the credit provider, as this right does not exist in the case when the consumer is not in default.²¹⁸ Furthermore, the right to terminate was not limited to the process prior to the reference to the Magistrates’ Court and continues until an order envisaged in s 87 has been made.²¹⁹

Malan JA states that the right contained in s 86(10) is balanced by s 86(11) that allows for resumption of debt review by an order of the Magistrates’ Court on any condition that the court considers to be just in the circumstances.²²⁰ Malan JA went further to state that it is at this moment that the participation of the credit provider in debt review becomes relevant: he is obliged to comply with reasonable requests of the debt counsellor and participate in good faith in the review and any negotiations in terms of s 86(5)(a) and 85(5)(b).²²¹

²¹⁶ Ibid.

²¹⁷ *Collet* supra (n3) at 12.

²¹⁸ Ibid.

²¹⁹ *Collet* supra (n3) at 11.

²²⁰ *Collet* supra (n3) at 15.

²²¹ Ibid.

Malan JA held that the words ‘hearing the matter’ in s 86(11) relate to the proceedings to enforce the agreement which could either be in, the High or the Magistrates’ Court that warranted a reading of the words ‘or High Court’ into the section.²²² The learned Judge stated that over-indebtedness is not a defence against summary judgment and the purpose of such a judgment was to prevent sham defences.²²³ However, although the factors do not constitute a defence to the claim, a defendant may request a court hearing a summary judgment application to consider a credit provider’s failure to participate or its bad faith in participating when deciding an application for summary judgment.²²⁴ The appellant *in casu* did not make such a request before the court *a quo* and did not place sufficient information before it in order to determine whether to order resumption.²²⁵

Malan JA did not approve the proposal made by the debt counsellor. It ‘envisaged a debt restructuring in terms of which the monthly installments payable on the mortgage bond would be reduced from R 6 644,93 to R3 500,00, but payable over the same period of time, that is 240 months, thereby depriving the credit provider of nearly half the value of the credit agreement.²²⁶ Malan JA considered this when dismissing the appeal and holding that the termination of debt review was justified.²²⁷ Malan JA further stated that such proposal was not in line with the NCA, in particular s 86(7)(c)(ii) which places limits on the proposal for the rearrangement as well as on the order to be made in terms of s 87(1).²²⁸ The learned Judge dismissed the appeal without an order of costs as none was sought.²²⁹

²²² *Collet* supra (n3) at 17.

²²³ *Collet* supra (n3) at 18.

²²⁴ *Ibid.*

²²⁵ *Collet* supra (n3) at 18 and 19.

²²⁶ *Collet* supra (n3) at 19.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

3.1.2 Analysis of the *Collet* judgment.

Although there is a need for debt review mechanisms in South Africa, the right balance ought to be struck, recognising that consumer credit is usually based on contract and as such, the debt relief measures should not ignore the underlying basis of the law of contract, namely *pacta sunt servanda*.²³⁰

It is submitted that Malan JA's judgment has various shortfalls that will be discussed in the course of this chapter. Although Malan JA, in interpreting the meaning of the provision, considered its express words and its context of operation, he ought to have taken other considerations in addition to s 86(5) and (11) into account. He ought to have considered the law on good faith and the socio-economic factors affecting the provision's operation. Although the learned Judge considered the purpose of debt review, he did not discuss the purpose of the particular provision and how it fosters the achievement of the purposes of the debt review process. The debt review process' impact on the credit provider's rights must be considered, however, sight must not be lost of the aims of the NCA and how they aim to empower and provide recourse for the consumer. It is acknowledged that the learned Judge could only discuss the issues presented before the court; however, the shortfalls outlined below indicate that there is a need to revisit this decision.

In interpreting s 86(10) the process set out by Wallis JA (with Farlam, Van Heerden, Cachalia and Leach JA concurring) in *Natal Joint Municipal Pension Fund*²³¹ will be applied, and provides as follows:

‘[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows. Interpretation is the

²³⁰ Boraine op cit (n102) 203.

²³¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra (n4).

*process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'*²³² [My emphasis]

Wallis JA in the *Natal Joint Municipal Pension Fund* case stated that this process must only be employed when attributing meaning to words that is, where there is a possibility of various meanings. This begs the question whether s 86(10) give rise to various meanings. If this question is answered in the affirmative, echoing the words of the learned judge 'a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'. The courts have been divided on this issue and have given rise to two schools of thought culminating in the decision of the *Collet*. The starting point to determine the sensible meaning is the language of the provision as discussed below.

3.1.2.1 The language in section 86(10).

Malan JA in interpreting the provision employed the express words of the section, stating that approach was the sounder one.²³³ The right contained in s 86(10) is only available when the conditions contained therein are satisfied, which are as follows:

- a. The consumer must be in default under the credit agreement;
- b. The credit agreement must be under review in terms of the s 86;

²³² Footnotes omitted.

²³³ *Collet* supra (n3) at 12.

- c. A period of at least 60 days should have lapsed.

The use of the word ‘may’ in s 86(10) suggests that credit provider has a voluntary right of termination. Upon the credit provider electing to exercise the voluntary right, the provision becomes prescriptive and states that the credit provider must notify the consumer, credit bureau and debt counsellor of the termination.

The use of the phrase ‘*being reviewed in section*’ as employed in this provision is problematic and has been the subject of many debates. It gives rise to the question as to what stages debt review comprises of. Whether it includes or excludes the referral of the debt rearrangement proposal to the court. From a plain reading of the express words of s 86 it provides for three stages, which constitutes an application for debt review, the first stage being an application in terms of s 86 which takes place between the consumer and debt counsellor. The second stage is the debt rearrangement proposal amongst the consumer, debt counsellor, and ideally the credit provider(s). The third stage is the referral to the court, which requires participation of the consumer, debt counsellor and the credit provider(s). The ambiguity in this case stems from the fact that s 86 provides for all the above but is however, titled ‘*application for debt review*’. As such, it is not clear which stage of the process set out in s 86; s 86(10) applies. Thus, a reading of the section leaves room for various interpretations.

Concerning the debt rearrangement by the debt counsellor, s 86(10) provides that it is a proposal, which upon acceptance by the court becomes an order. Therefore, there is a need to distinguish between, a proposal referred to court and which is still part of the application; and a proposal that has been accepted by court.²³⁴ When a proposal is referred to court, the matter is being considered in terms of s 86(8)(b) as such it forms part of s 86 thus in the ambit of ‘being reviewed in terms of s 86’ whereas when a court considers it, it does so in terms of s 87. As such it is submitted that the conclusion reached by Malan JA in *Collet* is accurate in this regard.

²³⁴ As defined in s 86: application by consumer to the debt counselor, the debt restructuring proposal and the referral to court of the same.

3.1.2.2 Context and environment of section 86(10).

Wallis AJ further stated that in order to determine the sensible or businesslike interpretation of a section, a consideration of its context or environment of operation must be employed.

Malan JA based his conclusion of the correct interpretation of s 86(10) in light of the express words and the provisions it operates in conjunction with, namely, s 86(5) and (11). The learned judge discussed the purpose of debt review and stated that the ‘duty to negotiate does not terminate when the debt counsellor refers his proposal to the Magistrates’ Court but continues pending the hearing’.²³⁵ In addition, the purpose of these negotiations is to result in responsible debt rearrangement.²³⁶ Malan JA further stated that the exercise of the s 86 (10) right does not terminate the hearing in terms of s 87 in respect of all the credit agreements, but only in respect of the one applicable to the credit provider that exercised its right in terms of the section.²³⁷ Furthermore, the s 86(10) right is balanced by s 86(11) which provides that if the credit provider has given notice to terminate and proceeds to enforce the agreement, the Magistrates’ Court may order that debt review resume on any conditions that it considers to be just in the circumstances. According to Malan JA this is the moment at which the participation of the credit provider becomes relevant. There is an obligation to comply with the reasonable requests of the debt counsellor in terms of s 85(5)(a) and to participate in good faith in the review and any negotiations designed to result in responsible debt rearrangement (s 85(5)(b)).²³⁸ The court stated that a failure or refusal by the credit provider to participate in the review might result in the court ordering a resumption of

²³⁵ *Collet supra* (n3) at 13.

²³⁶ *Ibid.*

²³⁷ *Collet supra* (n3) at 14.

²³⁸ *Collet supra* (n3) at 15.

the process. The court considered the submission of a financially unsound proposal²³⁹ when considering its resumption.²⁴⁰

Malan JA considered the purpose of the NCA as contained in s 3(c)(i) being the promotion of responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations by consumers.²⁴¹ The judge also considered that the NCA's approach to indebtedness 'is based on the principle of satisfaction of all responsible consumer obligations by providing for a consistent and harmonised system of debt restructuring' thereby prioritising the eventual satisfaction of all responsible consumer obligations.²⁴²

Considering the aims highlighted by Malan JA, a discussion of how the debt review process, in particular s 86(10) fosters these aims is necessary. The aim of s 3(c)(i) ought to be achieved through the enforcement of the assessment criteria as set out in s 88. It should be further achieved through the enforcement of credit agreements, and the debt review process and its effects. Although, debt review fosters achievement of this aim, it is questionable how s 86(10) contributes towards this.

In practice, the process can be costly. In order for the debt rearrangement proposal to be made an order of court, the consumer employs legal services. In the event that the credit provider employs its s 86(10) right and attempts to enforce the agreement, the consumer must employ further legal services when arguing that the resumption of the debt review process should be ordered in terms of s 86(11). This is bound to have a negative impact on the consumer's financial position. The same can be said about the provision contributing towards the Act's aim to foster satisfaction of all responsible consumer obligations. In the event that a consumer cannot employ legal services and cannot

²³⁹ A proposal that will not lead to the satisfaction by the consumer of all responsible financial obligation s 3(g) and (i) or a re-arrangement as contemplated by s 87.

²⁴⁰ *Collet* supra (n3) at 15.

²⁴¹ *Collet* supra (n3) at 10.

²⁴² *Ibid.* S 3(g) and 3(i) of NCA.

articulate its case in terms of the NCA, the Magistrates' Court will have to determine the case based on the facts and issues argued before it, possibly depriving the consumer of the benefits of the Act's application. Furthermore, it is illogical that a court should entertain such an application when the consumer can afford legal services; because in such a case it is probable that it is not over-indebted.

In addition, it is yet to be seen how this provision assists in the creation of a consistent and harmonised system of debt restructuring. The effect of the *Collet* judgment is that it creates two systems of debt restructuring: one that is employed in the case where a consumer is in default and the other where it is not in default but likely to experience financial strain. Although there is still a possibility for debt restructuring, the provision frustrates the creation of a consistent and harmonised system. It is submitted that based on Part D, in particular s 86 of the Act, it was not the intention of the legislature. The effect of the provision is that it frustrates the achievement of this aim.

Considering the overburdened court roll and the income inequality in South Africa, it cannot be said that the legislature intended that a consumer in default or experiencing financial strain must employ the long process demanded by the court in order to reap the benefits of the debt review process in light of the interpretation by Malan JA in *Collet*.²⁴³ Furthermore, at present the application fee for debt review is R50, which indicates that the legislature sought to make this process cheap, efficient and accessible. The commercialisation of the debt counselling process has resulted in the process by which most debt counsellors seek to make a profit, thus it is no longer the cheap process the legislature envisioned. Considering the fact that the process was intended to be readily accessible to consumers, it cannot be said that the extensive participation of the court and the need of legal services encourages this. From the number of postponements that took place in this case, it is evident that the Magistrates' Court should not be relied upon to resolve debt review matters. With the current stringent time limits and the already

²⁴³ This view is supported by Cameron J in *Sebola v Standard Bank Ltd* 2012 (5) SA 142 (CC) para 59 where he stated that NCA's innovations are consumer-friendly and court-avoidant procedures.

over-burdened Magistrates' Court roll, reliance on it will render the process in most cases expensive and unattainable. In December 2008, just over 42 000 consumers applied for debt review in terms of s 86 of the NCA, but less than 1600 cases proceeded through our courts.²⁴⁴ Although these statistics reflect the position seven years ago, it evidences the fact that the backlog facing our judicial system frustrates the aims of the Act.

The NCA aims to maintain a delicate balance of the parties' rights and sets out to rehabilitate the over-indebted consumer and promote the eventual satisfaction of the debt. However, the approach taken by Malan JA seems to place emphasis on punishing the consumer for being in default.

3.1.2.3 Sections in the NCA.

It is submitted that when considering the context in which s 86(10) operates cognisance must be had of the fact that the provision appears in Chapter 5 headed 'Consumer Credit Policy', in particular, Part D of the NCA that addresses over-indebtedness and reckless credit. Section 78 deals with the application and interpretation of Part D. Section 79 defines over-indebtedness and states how to determine it. It provides insight into what the legislature aimed to achieve with Part D of the Act, which includes s 86. It provides as follows:

'79. (1) a consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular *consumer is or will be unable* to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's -

(a) Financial means, prospects and obligations; and

(b) Probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

(2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the

²⁴⁴ Roestoff op cit (n185) 247/360.

time the determination is being made.

(3) When making a determination in terms of this section, the value of -

a) Any credit facility is the settlement value at that time under that credit facility; and

(b) Any credit guarantee is-

(i) The settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or

(ii) The settlement value of the credit agreement that it guarantees, guarantor has been called upon to honour that guarantee; or discounted by a prescribed factor.'

Section 80 defines 'reckless credit' while s 81 and 82 deals with its prevention and assessment mechanism and procedures. Sections 83 to 85 address the court's powers in relation to reckless credit agreements. Section 87 deals with the Magistrates' Court powers to rearrange the consumer's obligation. Section 88 deals with the effect of debt rearrangement order or agreement.

Section 86(10) also works in conjunction with s 86(5) in that it places an obligation on the parties in a debt review process to participate in good faith and comply with the reasonable requests of the debt counselor in order to facilitate the evaluation of the consumer's state of indebtedness. In addition, the section works alongside s 86(11). The section states that if the credit provider has given notice to terminate a review as contemplated in s 86(10) and it proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrates' Court hearing the matter may order the resumption of the debt review on any conditions it considers to be just. An in-depth analysis of what the good faith requirement entails will establish that the ground that Malan JA considered in his interpretation of s 86(10) and identified as a possible condition on which the court will order resumption is currently unenforceable.

Before the referral of a debt rearrangement proposal by a debt counselor to court the debt counselor should have concluded that consumer is over indebted. According to s 79, a consumer is over-indebted when it is or will be unable to satisfy its obligations. This means that consumer should be either in default or having trouble before the mechanisms in Part D are invoked. Essentially this means that Part D is meant to cater to

consumers in default or those who are likely to experience some strain. The interpretation of s 86(10) in *Collet* shifts the focus of the debt review process from those who are unable to satisfy their obligations (in default) to those who are likely to have trouble (not in default). Section 86(10) right does not deny consumers in default the opportunity to employ the debt review process, however, it acts as a restriction especially in light of s 86(11).

3.1.2.4 Far-reaching impact of the NCA.

In *Ex Parte Ford*²⁴⁵, the court illustrated that the NCA does not only apply in cases where the parties to a dispute invoke the Act. The court may require parties to look into the possible application of the mechanisms contained therein to resolve the issues. In refusing to grant an order for voluntary sequestration, the court took into consideration the possibility of recourse to the NCA as a matter of policy.²⁴⁶ Although the drafters of the NCA did not make provision for its parallel application alongside the Insolvency Act, the court's role in light of this judgment is to determine what is best for society or the parties to a dispute. 'Public policy gives preference to rights of responsible credit grantors over reckless credit grantors and enjoins full satisfaction, as far as it might be possible, by the consumer of all responsible financial obligations.'²⁴⁷ This approach emphasises the need for a credit provider to thoroughly assess whether or not the consumer can afford the credit and correctly identifies the invaluable service that debt review provides to society. It reiterates debt review's role as a means by which the legislature sought to alleviate over-indebtedness. As a result, it is essential that it operate effectively and efficiently.

3.1.2.5 Purpose of the provision and the background to its production.

²⁴⁵ 2009 (3) SA 376 (WCC).

²⁴⁶ *Ex Parte Ford* supra (n245) at 22.

²⁴⁷ *Ex Parte Ford* supra (n245) at 20.

The Department of Trade and Industry Draft Green Paper on the Consumer Policy Framework refers to the NCA among other legislation as consumer protection, accordingly, the NCA is considered in this light.²⁴⁸ The process of debt review was enacted in recognition of the fact that enforcement mechanisms are the integral part of consumer protection and that the ability of a consumer to obtain redress requires a coherent, adequately resourced and easily accessible infrastructure.²⁴⁹ It was further stated that at the time ‘redress for consumers was largely obtainable through the criminal and civil justice system as most laws empowered Magistrates’ Courts to deal with consumer issues and that the challenges facing government was that litigation of consumer abuses competed with serious and violent crimes as a result consumer abuses receive less attention’.²⁵⁰ It further highlighted, among other factors, that consumers were exposed to ‘lack of access of concise and balanced sale and purchase information, unfavourable deals and contract terms; and denial of fair settlement terms’.²⁵¹ These considerations should inform one’s interpretation of s 86(10).

Although, Malan JA thoroughly discusses the aim of the debt review process, he does not discuss the particular aims of the provision.²⁵² He correctly stated that purpose of the debt review process is ‘to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the Magistrates’ Court’.²⁵³ The learned judge went further to discuss the aims of the NCA but did not discuss how s 86(10) fosters the achievement of these aims and the purpose of debt review. He further differentiated the various sections by which debt review takes place, sections 83(3)(b), 87 or 85(a) and (b) from section 86.²⁵⁴ Furthermore, that the s 86(10) right is applicable where the consumer is default and the parties fail to agree and do not amend the credit agreement in terms of s 116 or file a consent order as envisaged by s 86(8)(a) and a s 87 hearing will follow.²⁵⁵ Although

²⁴⁸ Department of Trade and Industry op cit (n22) 23.

²⁴⁹ Department of Trade and Industry op cit (n22) 6.

²⁵⁰ Ibid.

²⁵¹ Department of Trade and Industry op cit (n22) 12.

²⁵² *Collet* supra (n3) at 10.

²⁵³ Ibid.

²⁵⁴ *Collet* supra (n3) at 11.

²⁵⁵ Ibid.

this assessment is correct, he does not identify what the purpose of s 86(10) is, which makes it impossible to determine if there is another means by which the purpose of the provision can be achieved.

The court in *Changing Tides 17 (Pty) Ltd v Erasmus*²⁵⁶ stated that s 86(10) serves four purposes. Firstly, it allows the credit provider to insist on timeous compliance by the debt counsellor.²⁵⁷ Secondly, it provides the debt counsellor with a period in which to complete the review process, the failure of which, affords the credit provider the right to pursue recovery proceedings.²⁵⁸ Thirdly, a s 86(10) notice sent to the National Credit Regulator affords it the means to monitor the proper functioning of the debt review system and the proper discharge of the debt counsellor's statutory obligation as contained in s 129(1)(b).²⁵⁹ Finally, the notice enables the consumer or the debt counsellor to bring an urgent application.²⁶⁰

Malan JA in respect of the time line for the process, stated that neither does the NCA set a 'time period within which the debt counsellor must make an application to the Magistrates' Court nor does it require the process of debt restructuring to be completed within the period of 60 days after the application was made.'²⁶¹ In light of this judgment, the provision serves three purposes that is, as a monitoring tool, an enabler for the consumer or the debt counsellor to bring an urgent application and a trigger for the credit provider's enforcement mechanism. The question that follows is whether these purposes can be achieved in a different manner.

Although Malan JA did not follow the interpretation process articulated in the *Natal Joint Municipal Pension Fund*, the learned judge, albeit not adequately, considers all the

²⁵⁶ 2010 JOL 25358 (WCC).

²⁵⁷ *Changing Tides 17* supra (n256) at 29.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ *Collet* supra (n3) at 12.

relevant aspects. His interpretation of the provision, although it balances the interests of the parties, is contrary to the purpose of debt review and the intention of the legislature in some respects. Although, his finding of the sound words of the provision is correct, it leads to absurd results. It leads to a complicated debt review process that in some cases result in the failure to achieve the purposes of the Act.

3.1.2.6 Right of access to court.

Malan JA's judgment is a result of the fact that the case was not argued on a constitutional basis and did not take into account whether this interpretation affects the consumers' constitutional rights. Malan JA stated that 'in her affidavit opposing the application for summary judgment the appellant did not deal with the merits of the respondent's case but only questioned the respondent's right to have the action instituted', which was the issue in *Collet*.²⁶² As a result the case was not argued in terms of the Constitution. It is unfortunate that the later application to the Constitutional Court was rejected.²⁶³ It is submitted that s 86(10) in most cases impacts upon the consumers' right of access to court. Its interpretation by the Supreme Court of Appeal exacerbates this further.

The *locus clasiscus* on time limitation clauses is the constitutional court judgment of *Barkhuizen v Napier*.²⁶⁴ Ngcobo J (with Madala J, Nkabinde J, Skweyiya J, Van der Westuizen J and Yacoob J concurring) for the majority dismissed the appeal and 'was unable to conclude that the 90-day period to the applicant to sue is so unreasonable that

²⁶² *Collet* supra (n3) at 6.

²⁶³ National Credit Regulator, 'Recent Constitutional Court decision could have dire consequences on consumers under debt review.' available at http://www.ncr.org.za/press_release/Recent%20constitutional%20court%20decision%20could%20have%20dire.pdf, accessed on 10 February 2015.

²⁶⁴ 2007 ZACC 5.

its unfairness is manifest and that therefore its enforcement would be contrary to public policy.’²⁶⁵ The clause in question reads as follows:²⁶⁶

‘If we reject liability for any claim made under this Policy we will be released from liability unless summons is served.... Within 90 days of repudiation.’

The court went further to state that clause in question ‘does not deny the applicant the right to seek judicial redress, it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability’- this is the definition of a limitation clause.²⁶⁷ It is submitted that the interpretation of s 86(10) in *Collet* results in the provision falling within this definition thus warranting an analysis of whether the judgment adheres to this precedent.

The court held that the proper approach to the constitutional challenges of contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves room for the ‘doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with constitutional values even though the parties may have consented to them’.²⁶⁸ The court considered the clause in question in light of s 34 of the Constitution, which guarantees the right to seek the assistance of the courts and stated that ‘our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals and this is fundamental to the stability of an orderly society’.²⁶⁹ Section 34 reflects the foundational values that underlie our constitutional order and constitutes public policy.²⁷⁰ The court further reiterated that our ‘courts have long held

²⁶⁵ *Barkhuizen* supra (n264) at 67.

²⁶⁶ *Barkhuizen* supra (n264) at 3.

²⁶⁷ *Barkhuizen* supra (n264) at 45.

²⁶⁸ *Barkhuizen* supra (n264) at 30.

²⁶⁹ *Barkhuizen* supra (n264) at 31.

²⁷⁰ *Barkhuizen* supra (n264) at 33.

that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy'.²⁷¹

The main thrust of the argument on behalf of the applicant was that the clause limits the applicant's right to seek judicial redress in court thus offends public policy.²⁷² The court stated that this argument must be considered in light of the fact that time limitation clauses are common in both statutes and contracts and their effects are the same in both contexts.²⁷³

The court stated that the applicable test in considering this question is the test set out in *Mohlomi v Minister of Defence*²⁷⁴ that is, whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress.²⁷⁵ The court in this case found two flaws in the provision in issue that together, rendered it unconstitutional. Firstly, it gave claimants 'too short a time' to give notice in the first place and to sue in the second.²⁷⁶ Secondly, the provision was inflexible.²⁷⁷

In order to determine whether the clause is contrary to public policy a determination of fairness and flexibility of the provision is considered. The court when determining whether the clause was fair asked two questions. Firstly, whether the clause itself is unreasonable and secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances that prevented compliance with the time limitation clause.²⁷⁸ The first question involves the weighing-up of two considerations. Firstly, public policy as informed by the Constitution (the consideration expressed in maxim *pacta sunt servanda*).²⁷⁹ This inquiry is directed at the objective terms of the contract.²⁸⁰ The extent to which the contract was freely and voluntarily concluded is a factor as it

²⁷¹ *Barkhuizen* supra (n264) at 34.

²⁷² *Barkhuizen* supra (n264) at 45.

²⁷³ *Barkhuizen* supra (n264) at 46.

²⁷⁴ 1997 (1) SA 124 (CC).

²⁷⁵ *Barkhuizen* supra (n264) at 51.

²⁷⁶ *Ibid.*

²⁷⁷ *Barkhuizen* supra (n264) at 62.

²⁷⁸ *Barkhuizen* supra (n264) at 56.

²⁷⁹ *Barkhuizen* supra (n264) at 57.

²⁸⁰ *Barkhuizen* supra (n264) at 59.

will determine the weight that should be afforded to the values of freedom and dignity and the fact that all persons have the right to seek judicial redress.²⁸¹ The second question involves an inquiry into the circumstances that prevented compliance with the clause thus the onus is upon the party seeking to avoid the enforcement of the time limitation clause to provide such information.²⁸²

Upon concluding this inquiry, the question remains whether, considering the circumstances of its conclusion, it still violates public policy. This stage of the inquiry is concerned with the reasonableness or otherwise of the period allowed by the clause, which must be assessed by reference to the circumstances of the parties.²⁸³ The court referred to *Mohlomi* where it was observed that the harshness of the statutory provision in issue must be assessed in light of the realities that prevail in South Africa.²⁸⁴ The appellant in *Collet* did not request the court to consider this issue.

In order to determine the impact of s 86(10) on the consumer's right of access to court the issue of fairness must be determined. This addresses whether the clause itself is reasonable and if so, whether it should be enforced in light of the circumstances that prevented compliance with the time limitation clause.²⁸⁵ In order to determine the provision's fairness, which is an objective inquiry, one must consider public policy as informed by the Constitution. In this case, the legislation is reflection of the people's will. On the other, that all persons have a right to seek judicial redress.

The second question requires an analysis into the circumstances that prevent compliance with the clause, which is a subjective inquiry.²⁸⁶ The court correctly, stated that 'it was unreasonable to insist on compliance with the clause if was impossible for the person to

²⁸¹ Ibid.

²⁸² *Barkhuizen* supra (n264) at 58.

²⁸³ *Barkhuizen* supra (n264) at 64.

²⁸⁴ Ibid.

²⁸⁵ *Barkhuizen* supra (n264) at 54.

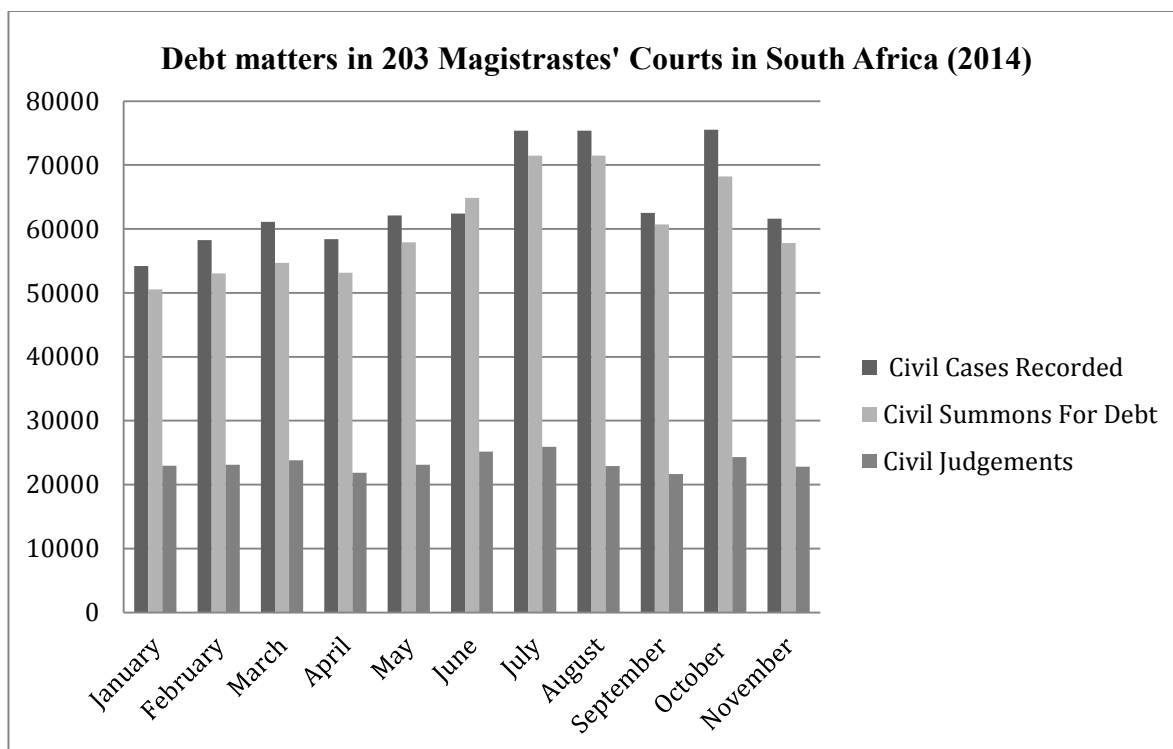
²⁸⁶ *Barkhuizen* supra (n264) at 58.

comply with the time limitation clause'.²⁸⁷ Further that 'the onus is on the person seeking to avoid the enforcement of the time limitation clause'.²⁸⁸ Although not argued before the court, the postponements in *Collet* among other factors made it impossible for the appellant to obtain an order from the court within the requisite period. The 60 days is insufficient for the consumer to obtain a proposal by the debt counsellor, its acceptance or rejection by the credit provider(s) and finally, an order confirming or rejecting the debt restructuring proposal by the court. This conclusion is supported by the findings of the Statistics South Africa surveys conducted in 203 Magistrates' Courts, which represent 98 per cent of all cases in South Africa, the results of which are depicted below:²⁸⁹

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Statistics South Africa 'Statistics of civil cases for debt (Preliminary)', available at http://beta2.statssa.gov.za/?page_id=1866&PPN=P0041&SCH=5869, accessed on 12 February 2015. The author compiled this table from the number of cases recorded, civil judgments for debts and civil summons for debts. The Statistics South Africa survey defines cases recorded as both civil and non-debt cases recorded. Civil summonses for debt are defined as notices to appear before the court of law where a dispute between two parties or people has to be heard, i.e. not a criminal offence. Civil judgments for debt matters are decisions taken in civil matter or a dispute between two people or parties.



The findings of Statistics South Africa demonstrate the fact that the civil summons for debt in comparison to civil judgments are disproportionate- less than half of the cases resulted in a judgment. Percentage point representation per month of civil judgments in comparison to civil summonses for debt in comparison from January to November respectively are as follows: 45.45 per cent, 43.54 per cent 40 per cent 45 per cent, 40.11 per cent, 40.26 per cent, 36.63 per cent, 32.06 per cent, 35.7 per cent, 35,6 per cent and 39.5 per cent. The court in *Barhuizen*, stated that a consideration of the realities that prevail in South Africa is relevant in the enquiry.²⁹⁰ There are various reasons for these results, one of which is that South Africa's court system is overburdened with criminal and civil matters. An interpretation of s 86(10) that does not consider this does not adequately take into account the context of operation of the provision.

Other research conducted on the debt review process identifies various obstacles. It can be said the parties to the process, individually contribute towards this. Although, the

²⁹⁰ *Barkhuizen* supra (n264) at 64.

research was conducted in January to April 2009, the findings provide insight into the industry and inform the interpretation of the provision.

It was found that credit providers did not furnish the certificate of balance ('COB') within the requisite period of five days as provided for in regulation 24(4) of the NCA.²⁹¹ As a result of the conduct of either the debt counsellor or the credit provider(s) 25 per cent of COB requests were found not have been responded to.²⁹² Out of 3 288 credit agreements reviewed, only 1493 were included in the proposals, 350 responses to the same were predominantly negative responses.²⁹³ This resulted in the debt counsellors referring the matter to court without sending the proposals to the credit providers.²⁹⁴ It was found that the different systems utilised by debt counsellors resulted in huge differences and formats of the proposals leading to either its acceptance or rejection.²⁹⁵

The average time from the date of application for the debt review process to the date the proposal was sent was found to be 58 days, leaving two days for the court to make an order before the credit provider can have the right to terminate the process in terms of s 86(10).²⁹⁶ Furthermore, it was found that 59 per cent of the debt counsellors were of the view that the prescribed 60 day period was insufficient for the process and that the two main factors contributing to this was the non-cooperation of credit providers and that the process generally requires a longer period.²⁹⁷ The non-cooperation of the credit providers was identified in relation to the acceptance or rejection of the proposal and the request for copies.²⁹⁸ Research conducted identified that only 28.5 per cent of the requested copies were issued within two weeks, the remainder was issued within one

²⁹¹ University of Pretoria 'The debt counseling process: challenges to consumer and the credit industry in general: April 2009' page 30.

²⁹² University of Pretoria op cit (n291) 31.

²⁹³ Ibid.

²⁹⁴ University of Pretoria op cit (n291) 32.

²⁹⁵ University of Pretoria op cit (n291) 45.

²⁹⁶ University of Pretoria op cit (n291) 34.

²⁹⁷ University of Pretoria op cit (n291) 44.

²⁹⁸ University of Pretoria op cit (n291) 35.

month or more.²⁹⁹ In addition, although not prescribed by either the NCA or its regulations, it was found that debt counsellors did not send out reminders to credit providers for non-compliance.³⁰⁰ It is submitted that such a reminder may positively affect the debt review process, as it would create a sense of urgency forcing the credit providers to participate. Furthermore, it was found that on a percentage point rating, debt counsellors rated credit providers' good faith participation at 39 per cent, which has an impact on the outcome of the process and the stakeholder's perception of the system.³⁰¹

Research identified that credit providers use the loopholes in the NCA to ensure that debt review matters are not heard on their true merits, by employing either the geographic or the monetary jurisdiction to oppose the matter.³⁰²

Another obstacle to debt review was identified to be the debt counsellors' inability to perform their functions efficiently, for example by making unacceptable or no proposals, which frustrates the debt review process.³⁰³ It was also found that in some cases credit providers reject 'proposals even though the counter proposal repayment period is longer' further frustrating the process and highlighting the importance of the key players being adequately equipped to perform their functions and meaningfully engaging in the process.³⁰⁴

The major blockages to the debt review process are because of the actions or the lack thereof by the credit providers and debt counsellors.³⁰⁵ Which begs the question, whether the consumer should bear the burden of the conduct of either the debt counsellor or credit provider. It is submitted that although the consumer could abuse the debt

²⁹⁹ Ibid.

³⁰⁰ University of Pretoria op cit (n291) 44.

³⁰¹ University of Pretoria op cit (n291) 41.

³⁰² See chapter 2.4 herein. University of Pretoria op cit (n291) 38.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

review process, other means that do not cripple the process can be engaged in order to curb this.

3.1.2.6.1 Inflexibility argument.

The court in *Barkhuizen* further stated that the second flaw that the court found in *Mohlomi* was that the statutory provision involved was inflexible, it insisted on strict compliance regardless of how harsh this may have been in a particular case.³⁰⁶ It considers whether, in all the circumstances of a particular case, having regard to the reasons for non-compliance with the clause, it would be contrary to public policy to enforce the clause.³⁰⁷ The party seeking to avoid the enforcement of the clause ought to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances.³⁰⁸ If a court finds that a time limitation clause does not afford a contracting party a reasonable and fair opportunity to approach a court, it will declare it to be contrary to public policy and therefore invalid. Furthermore, where a claimant seeks to avoid the enforcement of a time limitation clause on the basis that the non-compliance was caused by factors beyond its control, it is inconceivable that a court would hold the claimant to such a clause, for to do so would be contrary to public policy.³⁰⁹

Section 86(10) stipulates that in the case where a consumer is in default and 60 days has lapsed since the application of the debt review, the credit provider may terminate the process. On a literal reading of the provision, once the credit provider satisfies the conditions contained therein, it acts within its right to terminate the debt review process in respect of that credit agreement, as such the provision does not consider the particular circumstances of a case, which may be harsh in some instances. The inquiry is, having

³⁰⁶ *Barkhuizen* supra (n264) at 68.

³⁰⁷ *Barkhuizen* supra (n264) at 69.

³⁰⁸ Ibid.

³⁰⁹ *Barkhuizen* supra (n264) at 73.

regard to the facts of the present matter and in light of the fact that the reason for non-compliance are factors beyond the consumer's control, among them, the court's roll being full, it would it be contrary to public policy.

It submitted that still requiring compliance from the consumer in such a case might encourage the consumer to engage in self-help. This is in direct conflict with the right of access to courts in a constitutional state.³¹⁰

3.1.2.7 Good faith in South African law.

Malan JA considered the concept of good faith in s 86(5) obligation alongside s 86(11) as the balancing factors of s 86(10) right. However, he did not articulate what conduct by the parties fulfills this requirement of good faith but stated that it is one of the reasons a court may grant an order for resumption of debt review in terms of s 86(11).

The court in *Barkhuizen* found that the contention of the parties on whether the clause is enforceable regardless of how unfair or unjust raised difficult and complex questions concerning the development of the common law and the need to extend its applicable legal principles that seek to achieve justice and fairness to time limitation clauses.³¹¹ The court looked at the common law principle that states that law does not require people to do that which is impossible and good faith was implied in the operation of the clause countering the argument that the clause was inflexible and insisted on compliance even when this would be unjust.³¹² Whereas, the applicant submitted that the requirement of good faith is not part of our law, the court stated that the requirement of good faith in our

³¹⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) para 168.

³¹¹ *Barkhuizen* supra (n264) at 74.

³¹² *Barkhuizen* supra (n264) at 75.

common law of contract underlies its contractual relations.³¹³ When considering the s 86(5) obligation and its enforceability, one must consider the views set out below.³¹⁴

‘[82] As the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance, *good faith is given effect to by the existing common law rule that contractual clauses that are impossible to comply with should not be enforced. To put it differently: “Good faith . . . has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contracts.”* Whether, under the Constitution, this limited role for good faith is appropriate and whether the *maxim lex non cogit ad impossibilia* alone is sufficient to give effect to the value of good faith are, fortunately, not questions that need be answered on the facts of this case and I refrain from doing so.

[83] *While there is a compelling argument for the proposition that both the maxim lex non cogit ad impossibilia and the requirement of good faith should be applicable to the enforcement of time limitation clauses, the applicability of these common law principles will depend on the reason advanced for non-compliance.* In the view I take of the facts, it is not necessary to reach any firm conclusion on whether the *maxim lex non cogit ad impossibilia* and the requirement of good faith may be applied to the enforcement of a time limitation clause.’ [My emphasis]

In the case of *Southernport Developments (Pty) Ltd v Trasnet Ltd* (which was referred to by the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*³¹⁵), Ponnar AJA stated that our law on good faith accords with Australian law, which takes the view that certainty is the cornerstone of its enforceability by South African courts.³¹⁶ The learned Judge discussed three categories in which good faith is employed as a part of negotiations and stated in which situation it would be enforceable.³¹⁷ The case of debt review falls into the third categories which is as follows:

‘The promise to negotiate in good faith will occur in the context of an arrangement (to use a neutral term) which by its nature, purpose, context, other provisions or otherwise makes it clear that the promise is too illusory or too vague and uncertain to be enforceable.’

The court further stated that for an agreement to agree to be legally enforceable it must provide for a dispute resolution mechanism to which the parties have bound themselves.³¹⁸

³¹³ *Barkhuizen* supra (n264) at 80.

³¹⁴ Footnotes omitted.

³¹⁵ 2012 (1) SA 256 (CC) para 38.

³¹⁶ 2005 (2) SA 202 (SCA) para 16. The court followed the dictum in Australian case of *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd* (1991) 24 NSWLR 1.

³¹⁷ *Ibid.*

³¹⁸ *Southernport Developments* supra (n316) at 17.

The duty to negotiate in good faith appears in the debt review process, the nature of which requires that the parties engage in meaningful negotiations in order to reach a mutually beneficial agreement. The s 86(5) obligation as currently provided for in the process does not provide for a deadlock breaking mechanism thereby, making it illusory and vague. This view explains why the courts have struggled to definitively articulate what this obligation entails especially in respect of the credit provider.

In the first place, the consumer should only apply for debt review if it meets the requirements for the application, that is, experiencing financial strain or the likelihood of it. Secondly, the debt counsellor ought to act in good faith by only accepting applications from consumers who meet the requirements of the debt review process and not those who are seeking a 60 days ‘payment holiday’. Thirdly, the credit provider ought to participate in the debt review process by responding timeously to the requests of the debt counsellor and not employing its s 86(10) right regardless of the circumstances of the case. This conduct by the parties is desirable, but is too illusory. One should not ignore the fact that for the debt counsellor this is a line of business, while for the credit provider the s 86(10) right is a mechanism to protect its investment. The possibility that the court could find that the credit agreement was in fact recklessly granted in terms of s 87(1)(b)(i), is a loss for the credit provider, one which it would naturally seek to prevent. This influences the way the parties participate and perceive the process.

It is submitted that Malan JA’s findings in *Collet* that the good faith requirement applies when the debt counsellor is assessing the consumer’s indebtedness, prospects for responsible debt restructuring, and in the reviews and negotiations was correct.³¹⁹ However, the view that this requirement becomes more important upon the court ordering resumption in terms of s 86(11) cannot be supported.³²⁰ The court in *Ferris v Firstrand Bank Ltd and Another* was of the view that the good faith requirement is aimed at the parties reaching an agreement on debt restructuring before a debt

³¹⁹ *Collet* supra (n3) at 13.

³²⁰ *Collet* supra (n3) at 15.

restructuring order is needed, once it is granted this requirement becomes irrelevant.³²¹ Although, the difference in the views by the courts in *Collet* and *Ferris* does not constitute a conflict, this deviation supports the views of this author.

Concerning the good faith requirement, the court in *Mercedes Benz Financial Services South Africa (Pty) Limited v Dunga* did not define its precise ambit.³²² The court stated that in the absence of special circumstances a termination of the debt review process while the consumer is pursuing it in good faith and in a reasonable manner would not constitute good faith.³²³ In concluding, the court read into s 86(10) that the credit provider may only terminate a debt review if he is acting in good faith.³²⁴ This decision although it articulates the importance of the good faith requirement as most courts have, it does not clarify what it entails in this regard.

The court in *Seyffert & Seyffert v Firstrand Bank Ltd t/a First National Bank*³²⁵ attempted to provide some clarity when considering whether the credit provider had acted in good faith, by considering the appellant's failure to present any realistic proposal to pay the debt.³²⁶

Which begs the question why the court would engage in a balancing act of s 86(10) against the s 86(5) that is unenforceable, illusory and uncertain? Furthermore, what does this duty actually entail? It is submitted that the unenforceability of this obligation contributes towards the parties' resistance to engage in meaningful negotiations that frustrates the debt review process, the success of which is hinged on efficient and meaningful negotiations between the parties. The inability to precisely define what this obligation entails further perpetuates this.

³²¹ 2014 (3) SA 39 (CC) *para 19*.

³²² 2011 (1) SA 374 (WCC) *para 51*.

³²³ *Ibid.*

³²⁴ *Mercedes Benz Financial Services South Africa* *supra* (n322) at 52.

³²⁵ 2012 (6) SA 581 (SCA) *para 81*.

³²⁶ *Seyffert* *supra* (n325) at 12.

It is submitted that the whole process of debt review demands good faith participation from the credit provider. The good faith requirement in the debt review process, although currently unenforceable, is required during the entire process from the time of application to issue of a clearance certificate to the consumer. This requirement is important during the time when the proposal and order are being granted by the court as the parties involved ought to meaningfully engage in order to reach an appropriate outcome. The credit provider's participation in good faith during debt review allows this process to run smoothly and serve the purpose it ought to, namely to facilitate the debt restructuring of an over-indebted consumer. A mere rejection of the proposal by the credit provider as was seen in the *Collet* case should not be encouraged. The credit providers ought to have made constructive objections to the proposals in order to facilitate the resolution of the dispute. As van Heerden stated, the credit provider is not expected to engage in a cycle of counter proposal in this regard.³²⁷

Had the credit provider participated in the debt review process meaningfully from the beginning it is probable that the *Collet* case would not have ended up in the Supreme Court of Appeal, saving the court and all the parties time and resources. It is submitted that had the credit provider at least communicated why it had rejected the proposal, for example stated that the installments are too low, this would have at least alerted the debt counsellor of the shortfall in the proposal. This would grant the consumer and the debt counsellor an opportunity to revisit it before the referral to the court. *Collet's* approach to s 86(10) encourages the credit provider to be a passive participant in the debt review process until the time that it can employ its s 86(10) right. This begs the question, what is the point of requiring that the credit provider partake in the process when it is not expected to do anything other than enforce its rights? It is submitted that Malan JA's interpretation frustrates the debt review process and delays the benefits of having an out of court process conducted by debt counsellors.

³²⁷ Van Heerden op cit (n101) para 11.3.3.2.

3.2. Conclusion.

It is submitted that s 86(10), as result of the interpretation in *Collet*, encourages the debt spiral, as it requires a consumer to employ debt counselling and legal services, which are costly, when it may be over-indebted. Furthermore, it does not encourage the application of the NCA, the Act is notorious for its complexity and unclear provisions, and the approach taken by court in *Collet* conforms to this viewpoint.

The reality is that consumers who do not own assets are the ones who use credit the most and ‘unsecured lending is the most expensive form of debt’.³²⁸ It seems illogical to thus deprive them of the benefits of the NCA. As a result, it is submitted that more attention should have been given to the First National Bank (‘FNB’) submission during the National Credit Bill hearing. Before the various cases concerning s 86(10), very little attention was paid to it and its implications were of no concern. FNB correctly stated that in the event that s 86(10) was not amended to allow the magistrate to conduct the debt review in s 86(11), thereby shortening the process there should be a distinction between consumers.³²⁹ The distinction was necessary because ‘big’ or rich customers could afford lawyers therefore they did not require as much protection as poor consumers.³³⁰

The Department of Trade and Industry did not comment on this submission.³³¹ However, during the discussion it was highlighted that FNB itself did not differentiate between the consumers and that many of the problems with credit related to poor people, as they did

³²⁸ M Rees ‘SA workers trapped in debt hell’, 20 September 2012, available at <http://www.moneyweb.co.za/moneyweb-special-investigations/sa-workers-trapped-in-debt-hell>, accessed on 12 February 2015.

³²⁹ The Department of Trade and Industry *National Credit Bill Hearing Trade and Industry Portfolio Committee* August (2005).

³³⁰ Ibid.

³³¹ Ibid.

not have enough money to protect themselves.³³² The whole debt review process was formulated within this context. The reality is that credit providers will not come to the rescue of consumers as it is in their best interests not to do so. An understanding of how the credit market works makes it clear that credit providers make more money from consumers who cannot repay the debts as opposed to those who can. The interpretation of s 86(10) by Malan JA ignores this crucial fact.

3.2.1 National Credit Amendment Act section 86(10).

The NCA has been the subject of discussion in the legal, banking and parliamentary sectors because of its revolutionary nature the result of which has been amendments to the NCA. The National Credit Amendment Act in relation the debt review process aims to ‘to tighten measures relating to debt counsellor and conduct of their practices as debt counsellors’ and provides for s 86(10) as follows:

- (a) If a consumer is in default under a credit agreement that is being reviewed in terms of this section [86], the credit provider in respect of that credit agreement may, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to-
 - (i) The consumer,
 - (ii) The debt counsellor; and
 - (iii) The National Credit Regulator; and
- (b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.

The amendment of the section is indicative of the fact that the court’s findings in *Collet* did not adequately address the purposes and aims of the NCA. It is imperative that the amendments address the shortfalls of the *Collet* judgment if they are to meaningfully address the problems that the NCA sets out to remedy. Section 86(10)(b) acknowledges the fact that 60 business days is insufficient for a consumer to lodge an application for debt review with the debt counsellor and obtain an order from the court in respect

³³² Ibid.

thereof. This amendment addresses the fact that the time limitation clause is inflexible and does not allow the consumer sufficient time to achieve what is required of it. However, it neither encourages meaningful engagement nor adds clarity to what the duty to act in good faith requires of the parties. The section still provides for a termination of the process by the credit provider once 60 business days has lapsed without cause. Although, the amendment is likely to increase the chances of successful debt review, the dependence of the process on the court's time and resources is not desirable and is in contrast to the legislature's intention. Furthermore, this amendment although it remedies some of the obstacles, it has little or no impact on others, in particular the good faith requirement and the cost of legal services.

Matters of over-indebtedness require drastic measures, an attempt to balance the parties rights although, admirable, it is unattainable. The findings in of the *Changing Tides 17* case in respect of the purpose of debt review stated above³³³ still stand, this begs the question whether there is a less intrusive means of achieving those purposes.

³³³ Chapter 3.1.2.4 herein.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 CONCLUSION

In light of the above discussion it is submitted that although s 86(10) plays an important role in ensuring that there is a balance of power between the consumer and credit provider(s), the problem however lies in the fact that the system of debt review is not functioning as envisioned by the drafters of the NCA. The NCA plays a central role in alleviating over-indebtedness, a plague that has affected majority of the South African population. Therefore, it is essential that s 86(10) must be interpreted in light of the Constitution and the NCA. This research discusses possible solutions to the current problem. Although this research is not based on empirical data, research conducted elsewhere (which should be conducted for the rest of the country) and facts evidenced in case law, demonstrate that the 60 business days provided for by s 86(10) is inadequate.³³⁴

Regardless of which recommendation is implemented, there is a need to make provision for the consumer and debt counsellor's withdrawal from the process and the automatic lapsing of the process. There is a need to provide for means by which the consumer and the debt counsellor may withdraw from the debt review process, at present only the credit provider has that right (s 86(10)).³³⁵

³³⁴ M Roestoff 'Termination of debt review in terms of section 86(10) of the National Credit Act and the right of a credit provider to enforce its claim' *Obiter* 2010 782 at 790.

³³⁵ There have been contrasting views as to whether a debt counselor may withdraw from the debt review process. In *Rougier v Nedbank Ltd* (2013) ZAGPJHC 119, the court found that the debt counselor could not withdraw from the process, whereas in *Mercedes Benz Financial Services South Africa v Holtzhausen* (2012) ZAWCHC 382 the court found otherwise. ³³⁵ Roestoff op cit (n186) 284/360 state that in terms of the work stream agreement published in July 2008, the consumer and debt counselor may withdraw from the debt review process.

4.2 RECOMMENDATIONS

The most viable solution is one that allows debt review to take place without being detrimental to either the consumer or the credit provider. Most importantly, the solution must allow for the protection of the consumer, alleviation of over-indebtedness and curbing of the reckless granting of credit.

4.2.1 REMOVAL OF SECTION 86(10).

The removal of s 86(10) would allow the process to run uninterrupted and increase the chance of obtaining a debt restructuring proposal from debt counsellor and the eventual satisfaction of the debt. This would promote responsible granting of credit as the debt review process holds the credit provider liable for the granting of credit. Furthermore, this would provide for debt restructure in cases of over-indebtedness because the inadequacy of the 60 days period does not promote this aim. The removal of s 86(10) would take into account the fact that a consumer who is already in default is the perfect candidate for debt review. In such a case there is already proof of financial difficulties whereas if one is not yet in default it is questionable. In addition to this, a provision for the automatic lapsing of the debt review process in the event that there are no developments in the application should be made.

However, the removal of s 86(10) would result in a power imbalance between the two parties, which the Act sought to rectify would still occur. It would allow for the possibility of consumers to abuse the debt review process, for example by not providing the required information to the debt counselor thereby prolonging the process. However, the automatic lapsing of the process and the effect of the debt review process on the consumer would balance this to an extent.

Upon weighing the advantages and disadvantages of the removal of the s 86(10), it is evident that its removal would best serve the purposes and aims of the NCA in the current circumstances. The existence of s 86(10) frustrates more of the NCA aims than its removal does. The existence of this provision would not be a cause for concern if the system envisioned by the drafters of the NCA was working accordingly. In light of the current obstacles facing the debt review process, this provision frustrates the achievement of the goals the Act.

One must not ignore the fact that its removal would result in a power imbalance between the parties as such it is not desirable; but the level of indebtedness in the country is a cause for concern and has been stated as a cause of strikes on the platinum belt.³³⁶ Although the removal of the section in the interim is not practical because legislation is enacted for the long term, it could allow the debt review process to contribute towards the alleviation of over-indebtedness until the levels of over-indebtedness have stabilised and can no longer be seen a plague affecting majority of the South African population. This action would be a compromise between the two extreme ends of the spectrum, the existence and the removal of s 86(10). It is submitted that this would be for the greater of the good of the country.

4.2.2 AMENDING THE ACT.

4.2.2.1 Section 86(6)(a).

Section 86(6)(a) provides that:

‘A debt counsellor who has accepted an application in terms of this section [86] must determine, in the prescribed manner and within the prescribed time-

(a) Whether the consumer appears to be over-indebted.’

It is submitted that the above stated section should be amended to provide that the debt counsellor should determine whether the consumer ‘*is over-indebted*’ and not ‘*appears*

³³⁶ Rees op cit (n328).

to be over-indebted'. The evidentiary burden in regards this assessment is too lenient, it leaves room for abuse of the process by the consumer and the debt counselor. As the provision currently provides it seems as though the debt counsellor accepts any and every application, as the assessment requirement is too lenient.

An amendment of the section to stating that prior to the debt counsellor accepting the application it should determine whether the consumer '*appears to be over-indebted*' and upon, accepting the application it should determine whether the consumer is '*over-indebted*' would better serve the interests of the parties. The latter assessment would require a more rigorous inquiry than the former, which would prevent the over-burdening of the judicial system and prevent abuse of the debt review process to an extent.

The amendment would also be coupled with an amendment of s 86 to provide for a withdrawal from the process by consumer and the debt counsellor.³³⁷ In addition, regulations stating the period in which the debt counsellor would discharge this evidentiary burden should be provided for. In respect of the assessment prior to the acceptance of the application, the regulations would provide for a shorter assessment period, as the debt counsellor would be using the information provided to it by the consumer. A longer assessment period would be provided for in order to allow the debt counsellor sufficient time to assess the information provided for by both the consumer and the credit provider(s).

4.2.2.1 Section 86(11).

The solution to the problem created by s 86(10) might also lie in an amendment of s 86(11). Section 86(11) can be amended to provide for debt review by the court in the

³³⁷ This recommendation does not provide for removal of s 86(10), thus the credit provider would still have a means of withdrawal from the process unlike the other parties.

case where a resumption of the process is ordered as opposed to referring the case back to the debt counsellor.³³⁸ This would be less cumbersome. At present, the matter is referred back to the debt counsellor and when the debt restructuring proposal is completed the matter is heard in court in order for it to be made an order of court. This would resolve (to an extent) the problem; however, the process would still be time and resource intensive. The process would still require that the consumer employ legal services, which the Act clearly sought to limit by providing that the debt review process predominantly takes place out of court. As such, it is not best suited to provide recourse for the majority of the consumers.

Although not ideal, this amendment would increase the chances of the achievement of NCA aims that are currently frustrated by s 86(10). As such, this amendment should occur only in the event that the amendments to s 86(10) discussed below do not take effect.

4.2.2.2 Section 86(10)

Increase in time frame of debt review

A more viable solution would be the amendment of s 86(10) to provide for a longer period for debt review. Although not conclusive for the entire country, the research makes it clear that the 60 business days provided for by s 86(10) is insufficient to complete the debt review process and that 82 business days is a more realistic period.³³⁹ In support of this finding, other research also found that it takes 58 days on average for a debt counsellor to complete a proposal leaving two days in which the preparation of a court application must take effect.³⁴⁰ Although, the completion of this application may be possible within the two days it is however not sustainable. Considering the time constraints of the process, it is understandable that debt counsellors would strategically refer the matter to the court before a response from the credit provider(s). An

³³⁸ National Credit Bill Hearing op cit (n 329).

³³⁹ Roestoff op cit (n334) 790.

³⁴⁰ University of Pretoria op cit (n291) 34.

amendment providing for a longer period before the credit provider can enforce its s 86(10) right would allow s 86 in its entirety to run as envisioned by the drafters of the NCA. It would allow the debt counsellor sufficient time to fulfill its role in the debt review process and forcing the credit provider(s) to participate meaningfully in the process thereby lessening the burden on the courts. This should be coupled with the requirement that the debt counsellor should provide proof that they have attempted to meaningfully engage with the credit provider before the referral to court.

The 60 business days currently provided for in terms of s 86(10) although not prescribed by the NCA, allows for 30 business days in which the debt counsellor must determine whether the consumer appears to be over-indebted.³⁴¹ In the case where the consumer is found not to be over-indebted and rejects the application, it must be advised of its right to approach the court directly within 20 business days.³⁴² The hearing before the magistrate and a rearrangement order in terms of s 87 must be finalised within the remaining ten business days.³⁴³ It is submitted that these periods are not realistic considering the constraints faced in the debt review process and judicial system.

90 business days would provide a sufficient time for the debt counsellor to perform his duties. This amendment would allow for more than 30 business days in which the debt counsellor ought to have completed the debt restructuring proposal. It is submitted that the 20 business days for referral to the court seems adequate, however the problem seems to be the court hearing the matter. As was seen in the *Collet* case, the hearing was set down for 10 June 2010 but was postponed to 12 August 2010 that is more than a 60 days postponement (the period in which the entire process ought to be finalised).³⁴⁴ A breakdown of the period for each phase of the debt review process is beyond the scope of this research, however any amendment must take into account the backlog faced by the judicial system. An increase in the period for debt review process coupled with the

³⁴¹ *Wesbank a division of Firststrand Bank Ltd v Papier (with the NCR as Amicus Curriae)* 2011 (2) SA 395 (WCC) para 25.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Wesbank a division of Firststrand Bank Ltd* supra (n 341) at 2.

meaningful engagement of the parties would increase the chances of successful debt restructuring by the debt counsellor without intervention by the courts. It could contribute towards preventing the debt counsellor referring the matter to the court before the credit provider's involvement in the process. This would allow more consumers to access the remedy afforded to them by the Act.

An amendment of the number of business days to 120 or 150 could be to the detriment of the credit providers because of the process's effects on the enforcement of the credit agreement, resulting in a power imbalance contrary to the purpose and aims of the NCA. However, if this period would allow for the alleviation of over-indebtedness and curbing the reckless granting of credit, it should be effected. The possibility of abuse of the process by the consumer in this regard could be curbed by the inclusion of grounds for termination and granting an order for costs that are discussed below.

Section 86(10) has been amended to restrict the termination of the process to the cases that have not been referred to the court that better serves the NCA's aims. However, it is questionable whether this amendment will remedy of the effects of this limitation clause. This amendment allows for the hearing of more debt review matters by the court, however, it does not encourage meaningful engagement by all the parties culminating in a viable debt rearrangement proposal. It encourages the debt counsellor and the consumer to preempt the credit provider's response to the debt rearrangement proposal and encourages the referral of the matter to the court before its engagement in order to have the matter heard by the court. The results of which is a flooding of the court's roll of such matters, which is contrary to the legislature's aims.

Ground for termination.

In addition to an increase in the period, it is proposed that an inclusion of grounds for the termination would better serve the interests of justice and fulfills the purpose and aims of

the Act. The consumer or the debt counsellor's failure to act in good faith is a ground for termination that is acceptable in the light of the purposes and aims of the Act.³⁴⁵

Section 86(10) merely makes provision for unilateral termination of the debt review process without any reason, as long as 60 business days lapsed and the consumer is in default. As such even when the credit provider does not cooperate, it can still invoke this right. Although, there resumption of the process may be ordered, such conduct frustrates the debt review process and achievement of the aims of the NCA. This amendment would rectify such conduct.

Various courts have considered the requirement of good faith participation by the parties in the debt review as discussed above and have attempted to articulate what that duty entails, however, the unenforceability of the good faith obligation in the debt review hinders such efforts. An amendment of s 86(10) to state that the credit provider can only exercise this right if it acted in good faith will address the concerns discussed. Such an amendment should be coupled with an amendment of the s 86(5)(b) good faith obligation to ensure its enforceability as was discussed above.³⁴⁶

An order for costs.

In the event that the s 86(11) amendment allowing the court to conduct the debt review is not implemented, s 86(10) should be amended to state that in the event that the court orders a resumption of the debt review process, an order for costs should be made. The court would grant this order in favour of the consumer when it is over-indebted or when the court finds that the credit was recklessly granted. Such an order should also be

³⁴⁵ The court in *Mercedes Benz Financial Services South Africa* supra (n322) at 52 read into s 86(10) that the credit provider could only terminate the debt review process if it had participated in good faith.

³⁴⁶ See further Chapter 3. In order to make the good faith requirement enforceable, the legislature could make provision for a dead lock breaking mechanism for example a tribunal to determine whether the parties acted in good faith.

granted where either party is found to not have been acting in good faith. If the court finds that the consumer is not to be over-indebted, it would grant an order in favour of the credit provider. If the court finds that the debt counsellor's conduct or lack thereof frustrated the debt review, the court would grant an order for costs against it.

This would take into account the fact that the judicial process is expensive and had the parties acted in good faith, the debt review process could have played its role in ensuring the eventual satisfaction of the debt without extensive involvement of the court or legal practitioner. This would serve as deterrent, punishing credit providers, debt counsellors or consumers whose conduct frustrates the aims and purposes of the Act. Furthermore, it would force the parties to take the process seriously and hold them accountable for their actions.

Bibliography

Cases

Barkhuizen v Napier 2007 ZACC 5.

BMW Financial Services South Africa (Pty) Ltd v Donkin 2009 (6) SA 63 (KZD).

Changing Tides 17 (Pty) Ltd v Erasmus 2010 JOL 25358 (WCC).

Changing Tides 17 (Pty) Ltd v Grobler 2011 ZAGPHC 84.

Collet v Firststrand Bank (2011) (4) SA 508 (SCA).

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).

Ex Parte Ford 2009 (3) SA 376 (WCC).

Ferris v Firststrand Bank Ltd and Another 2014 (3) SA 39 (CC).

Firststrand Bank Ltd t/a Honda Finance v Owens 2013 (2) SA 325 (SCA).

Mahomed v Lockhat Brothers & Co Ltd 1944 (AD) 230.

Mercedes Benz Financial Services South Africa (Pty) Limited v Dunga 2011 (1) SA 374 (WCC).

Mercedes Benz Financial Services South Africa v Holtzhausen (2012) ZAWCHC 382.

Mohlomi v Minister of Defence 1997 (1) SA 124 (CC).

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 ZASCA 13.

National Credit Regulator v Nedbank Ltd 2009 (6) SA 295 (GNP).

Nedbank Ltd v National Credit Regulator 2011 (3) SA 581 (SCA).

S v Makwanyane 1995 (3) SA 391 (CC).

SA Taxi Securitisation v Matlala (2010) ZAGPJHC 70.

Seyffert & Seyffert v Firststrand Bank Ltd t/a First National Bank 2012 (6) SA 581 (SCA).

Sebola v Standard Bank Ltd 2012 (5) SA 142 (CC).

Southernport Developments (Pty) Ltd v Trasnet Ltd 2005 (2) SA 202 (SCA).

Standard Bank v Panayiotts (2009) ZAGPHC 22.

Standard Bank v Payayiotts 2009 (6) SA 295 (W).

Rougier v Nedbank Ltd (2013) ZAGPJHC 119.

Wesbank a division of Firststrand Bank Ltd v Papier (with the NCR as Amicus Curriae)
2011 (2) SA 395 (WCC).

Statutes

Credit Agreements Act 75 of 1980.

Insolvency Act 24 of 1936.

Magistrates' Courts Amendment Act 63 of 1976.

Magistrates' Court Act No. 32 of 1944.

National Credit Act 32 of 2005.

National Credit Act Amendment No. 19 of 2014.

Usury Act 73 of 1968.

Books

A Boraine in M Kelly-Louw, JP Nehf and P Rott *The future of consumer credit regulation* (2008) Ashgate Publishing Limited, Aldershot.

N Campbell and S Logan *The Credit Guide: manage your money with the National Credit Act* (2008) Juta, Cape Town.

RM Goode *Consumer Credit* (1978) A.W Sijthoff International Publishing Company bv, Leyden/Boston.

C van Heerden in JW Scholtz *et al Guide to the National Credit Act* (2008) LexisNexis, Durban.

M Kelly-Louw and PN Stoop *Consumer Credit Regulation in South Africa* (2012) Juta, Cape Town.

JM Otto *The National Credit Act Explained* 2ed (2010) Butterworths: Durban.

S Pete, D Hume, M du Plessis and R Palmer *Civil Procedure: A practical guide* 2ed (2011) Oxford University Press Southern Africa, Cape Town.

R Sharrock, R Smith and A Van Der Linde *Holckly's Insolvency Law* 9ed (2012) Juta, Cape Town.

C Theophilopoulus, A Rowan, CM van Heerden *Fundamental Principles of Civil Procedure* 2ed (2012) Butterworths, Durban.

Journals articles

B Bentley 'Separating the baby and the bath water - garnishee and emoluments attachment orders' 2013 *De Rebus* 22.

A Boraine, C van Heerden and M Roestoff 'A comparison between formal administration orders and debt review- the pros and cons of these measures and suggestions of law reform (Part 2).' (2012) *De Jure* 254.

A Boraine and C van Heerden 'To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments.' 2010 (13) 3 84/508.

J Campbell 'The Excessive Cost of Credit on Small Money Loans under the National Credit Act 34 of 2005.' 2007 19 *SA Merc LJ* 251.

KM Louw 'Prevention and alleviation of consumer over-indebtedness.' 2008 20 *SA Merc LJ* 200.

M Roestoff 'Termination of debt review in terms of section 86(10) of the National Credit Act and the right of a credit provider to enforce its claim.' (2010) *Obiter* 782.

M Roestoff, F Haupt, H Coetzee and M Erasmus 'The debt counselling process- closing the loopholes in the National Credit Act 34 of 2005.' *PER* (2009) 12 247/360.

Internet sources

F Haupt 'Blockages in the debt counselling process: UP Law Clinic Report April' (2009) http://www.ncr.org.za/index.php?option=com_content&view=article&id=126, accessed on 21 September 2012.

Financial Diaries 'Investigation the financial lives of the poor: findings in brief', available at <http://www.financialdiaries.com/files/Findings%20in%20brief.pdf>, accessed 20 February 2014.

M Heymans 'Blockages in the Debt Counselling Payment Distribution System' (2009), available at http://www.ncr.org.za/index.php?option=com_content&view=article&id=126, accessed 21 September 2012.

M Rees 'SA workers trapped in debt hell', 20 September 2012, available at <http://www.moneyweb.co.za/moneyweb-special-investigations/sa-workers-trapped-in-debt-hell>, accessed on 12 February 2015.

University of Pretoria 'The debt counseling process: challenges to consumer and the credit industry in general: April 2009'.

University of Pretoria Law Clinic ‘The incidence of and the undesirable practices relating to garnishee orders in South Africa.’, available at <http://www.ncr.org.za/publications/GARNISHEE-ORDERS-STUDY-REPORT.pdf>, accessed on 20 March 2014.

University of Pretoria ‘The incidence of and undesirable practices relating to garnishee orders – a follow up report.’, available at <http://web.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>, accessed on 15 March 2014.

Government sources

Credit and borrowing in South Africa Finscope Consumer survey South Africa 2012, available at http://www.ncr.org.za/press_release/research_reports/NCR_14.03.2013.pdf, accessed on 12 February 2015.

National Credit Regulator, ‘Recent Constitutional Court decision could have dire consequences on consumers under debt review.’ available at http://www.ncr.org.za/press_release/Recent%20constitutional%20court%20decision%20could%20have%20dire.pdf, accessed on 10 February 2015.

National Credit Regulator ‘Annual Report 2013/2014’, available at <http://www.ncr.org.za/publications/NCR%20AR%202014%20lr.pdf>, accessed on 12 February 2015.

The Department of Trade and Industry South Africa *Credit Law Review: Background Research*.

The Department of Trade and Industry *National Credit Bill Hearing Trade and Industry Portfolio Committee* August (2005).

The Department of Trade and Industry ‘South Africa Consumer Credit Law Reform: Policy Framework for

Consumer Credit’, August 2004, available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2005/050608consumer.pdf>, accessed on 12 February 2015.

The Department of Trade and Industry ‘Credit Law Review Summary of the finding of the technical committee’, August 2003, available at http://www.ncr.org.za/publications/Background_NCA_docs/Summary%20of%20Findings.pdf, accessed on 12 February 2015.

The Department of Trade and Industry ‘Draft Green Paper on the Consumer Policy Framework’ 9 September 2004, available at http://www.gov.za/sites/www.gov.za/files/26774_1.pdf, accessed on 12 February 2015.

The Department of Trade and Industry *National Credit Bill Hearing Trade and Industry Portfolio Committee* August (2005).

The National Credit Regulator ‘Fees Guidelines’, available at http://www.ncr.org.za/pdfs/Guidelines/2011/Debt_Counselling_Fee_Guidelines.pdf, accessed on 2 April 2014.

South African Law Reform Commission ‘Review of administration orders (Project 127): Questionnaire on abolition of administration orders’, available at <http://www.justice.gov.za/salrc/media/2008%2003%2007%20Media%20statement%20Questionnaire%20Administration%20Orders.pdf>, accessed on 28 March 2014.

Statistics South Africa ‘Income and Expenditure of households 2010/2011 Statistical Release P0100’, 6 November 2012, available at <http://www.statssa.gov.za/publications2/statsabout.asp?PPN=P0100&SCH=>, accessed on 12 February 2015.

Statistics South Africa ‘Statistics of civil cases for debt (Preliminary)’, available at http://beta2.statssa.gov.za/?page_id=1866&PPN=P0041&SCH=5869, accessed on 12 February 2015.

Working Paper 29 Project 63 ‘Review of the law of Insolvency: Prerequisites for alternatives to sequestration (1989) Schedule 3.

Magazine

Consumer Fair December 2012/January 2013 published by On the dot, a division of Media24.

Thesis

J Campbell *The Cost of Credit in the Micro-finance Industry in South Africa* (LLM thesis, Rhodes University, 2006).

Research dissertation/ research paper presented for the approval of Senate in fulfillment of part of the requirements for the LLM (Commercial Law) in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM (Commercial Law) dissertation/research paper, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

SIGNATURE

DATE